Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WILLIAM G. HAYS JR., RECEIVER AND DISBURSING AGENT ON BEHALF OF DEBTORS, HANNOVER CORPORATION, ET AL.

Petitioners,

v.

JIMMY SWAGGART MINISTRIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the legal standard for evaluating a defendant/transferee's good faith under 11 U.S.C. §548(c) an objective standard, a subjective standard, or no standard?

2. Must a defendant/transferee prove that the property transferred confers a benefit on the debtor under 11 U.S.C. §548(c) or only prove that the transferee gave up property?

3. Does 11 U.S.C. §548(c) allow a defendant/transferee to keep only the amount of cash it received from the debtor that is equal to the proven dollar value of the property transferred to the debtor or all the cash it received if it proves that the property transferred had any value?

4. Is it a Fifth Amendment due process violation for an appellate court to fail to follow its own principle of appellate review -- that an issue neither listed nor briefed by an appellant will not be considered on appeal -- without affording the appellee notice and opportunity to be heard on the issue?

5. Is it a Fifth Amendment due process violation for a trial court to decide issues of fact based in part on facts outside the record but known by the trial judge and based on the facts of a 27-year old reported decision of a case involving none of the parties to the present case?

PARTIES TO THE PROCEEDING

Petitioner

William G. Hays Jr., Receiver and Disbursing Agent on Behalf of Debtors, Hannover Corporation, Redwood Raevine Corporation, Rubicon XXI Corporation, Place Vendome, Inc., Place Vendome Corporation of America, Penzance, Lt., ATG, Inc.

Respondent

Jimmy Swaggart Ministries

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities vii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH EVERY OTHER CIRCUIT DECISION TO ADDRESS THE ISSUE OF GOOD FAITH BECAUSE INSTEAD OF USING AN OBJECTIVE STANDARD TO REVIEW GOOD FAITH, IT USED EITHER NO STANDARD OR A SUBJECTIVE ONE 7

II. THE FIFTH CIRCUIT'S DECISION ON VALUE CONFLICTS WITH DECISIONS OF THIS COURT, THOSE OF THE THIRD, FOURTH, AND ELEVENTH CIRCUITS, VIOLATES THE PLAIN LANGUAGE OF SECTION 548, AND IGNORES THE POLICY SUPPORTING FRAUDULENT TRANSFER LAW SINCE ELIZABETHAN TIMES 9

A. The Fifth Circuit Decision Conflicts with Decisions of this Court and Other Circuit Courts by Failing to Apply the Plain Language of §548(c) Requiring Proof of a Benefit to the Debtor 11

B. The Fifth Circuit Decision Conflicts With the Third, Fourth, and Sixth Circuits Tests for Value under §548 in Looking at JSM's Lost Opportunity Costs and Who Proposed the Options' Timing as Proof of Value, Instead of the Probabilities that the Options Could be Exercised Before They Expired and the Monetary Value of Any Such Probabilities 15

III. SUBSTANTIAL POLICY REASONS EXIST FOR REVIEWING THE FIFTH CIRCUIT'S DECISIONS ON VALUE AND GOOD FAITH 21

IV. THE FIFTH CIRCUIT COURT OF APPEALS VIOLATED HAYS' DUE PROCESS RIGHTS BY OVERTURNING THE LOWER COURT DECISION BASED UPON AN ISSUE NOT RAISED BY JSM ON APPEAL, NOT BRIEFED BY EITHER PARTY AND SUPPORTED ONLY BY THE BANKRUPTCY COURT'S IMPROPER JUDICIAL NOTICE OF FACTS OUTSIDE THE RECORD 23

A. Hays' Due Process Rights Were Violated When The Fifth Circuit Ignored A Consistent Line Of Procedural Cases Instructing that All Issues Not Raised On Appeal Are Abandoned 23

B. Hays' Fifth Amendment Due Process Rights Were Violated When The Bankruptcy Judge Took Judicial Notice Of A 27-Year Old Case In Which Neither Hays Nor The Debtors Were Parties, And Without Giving Hays An Opportunity To Present Evidence To Contradict The Judicially Recognized Facts Outside The Record Which Provided The Sole Support For Granting JSM's Ordinary Course Of Business Defense 25

Conclusion 27

Appendix

Appendix A
Fifth Circuit Court of Appeals Opinion Denying Petition for Rehearing En Banc, 11/27/02 . . . . . 1a

Appendix B
Fifth Circuit Court of Appeals Opinion, 10/29/02 . . . . . 4a

Appendix C
United States District Court, Middle District of Louisiana Ruling on Appeal after Remand, 3/29/01 . . . . . 22a

Appendix D
United States Bankruptcy Court, Middle District of Louisiana Opinion on Remand from the District Court, 7/16/99 . . . . . 32a

Appendix E
United States District Court, Middle District of Louisiana Ruling on Appeal, 2/4/99 . . . . . 48a

Appendix F
United States Bankruptcy Court, Middle District of Louisiana Memorandum Opinion, 9/7/95 . . . . . 66a

Appendix G
Text of Bankruptcy Code and Federal Rules of Evidence Provisions Involved in Case 144a

TABLE OF CITED AUTHORITIES

Cases:

Allard v. Flamingo Hilton (In re Chomakos),
69 F.3d 769 (6th Cir. 1995) 18

BFP v. Resolution Trust Corporation,
511 U.S. 531, 114 S.Ct. 1757,
128 L.Ed. 556 (1994) 10

Blonder-Tongue Laboratories, Inc. v.
University of Illinois Foundation,
402 U.S. 313, 91 S.Ct. 1434,
28 L.Ed.2d 788 (1971) 26

Bonded Financial Services, Inc. v.
European American Bank,
838 F.2d 890 (7th Cir. 1988) 13

Bouie v. City of Columbia,
378 U.S. 347, 84 S.Ct. 1697,
12 L.Ed.2d 894 (1964) 23

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107
(1930) 23

Brown v. Third National (In re Sherman),
67 F.3d 1348 (8th Cir. 1995) 7

Connecticut Nat'l Bank v. Germain,
503 U.S. 249, 112 S.Ct. 1146,
117 L.Ed.2d 319 (1992) 13

Covey v. Commercial National Bank of Peoria, et al.,
960 F.2d 657 (7th 1992) 20

Financial Federated v. Kozyak,
309 F.3d 1325 (11th Cir. 2002) 19

Goldberg v. Kelly,
397 U.S. 254, 269, 25 L.Ed.2d 287,
90 S.Ct. 1011 (1969) 26

Hardy v. Johns-Manville Sales Corp.,
681 F.2d 334 (5th Cir. 1982) 26

Harell v. Beall,
84 U.S. 692 (1873) 7

Hartford Underwriters Ins. Co. v.
Union Planters Bank, N.A.,
530 U.S. 1, 120 S.Ct. 1942,
147 L.Ed.2d 1 (2000) 12

Hayes v. Jimmy Swaggart Ministries
(In re Hannover Corp.),
2002 U.S. App. LEXIS 24649
(5th Cir. 2002) 1

Hays v. Jimmy Swaggart Ministries,
263 B.R. 203 (M.D. 1999) 1, 18, 24

Huffman v. Commerce Security Corp. (In re Harbour),
845 F.2d 1254 (4th Cir. 1988) 7

In re Agricultural Research and Technology Group,
916 F.2d 528 (9th Cir. 1990) 8

In re Allied Development Corporation,
435 F.2d 372 (7th Cir. 1970) 8

In re Grand Chevrolet, Inc.,
25 F.3d 728 (9th Cir. 1994) 20

In re Jet Florida Systems, Inc.,
861 F.2d 1555 (11th Cir. 1988) 20

In re M & L Business Machine Co., Inc.,
84 F.3d 1330 (10th Cir. 1996), *cert. denied*
519 U.S. 1040, 117 S.Ct. 608,
136 L.Ed.2d 534 (1996) 8

In re Morris Communications NC, Inc.,
914 F.2d 458 (4th Cir. 1990) 17, 18

In re R.M.L. Inc.,
92 F.3d 139 (3rd Cir. 1996) 15

In the Matter of Steel Structures, Inc.,
466 F.2d 207 (6th Cir. 1972) 7

In re Southern Land Title Corp.,
301 F.Supp. 379 (E.D. La. 1968) 6, 26

In re West Dor, Inc.,
996 F.2d 237 (10th Cir. 1993) 20

Jimmy Swaggart Ministries v. Hayes
(In re Hannover Corp.),
310 F.3d 796 (5th Cir. 2002) 1

Matter of Fairchild Aircraft Corporation,
6 F.3d 1119 (5th Cir. 1993) 17

Parklane Hosiery Co. v. Shore,
439 U.S. 322, 99 S.Ct. 645,
58 L.Ed.2d 552 (1979) 26

P&Gamble v. Amway Corp.,
242 F.3d 539 (5th Cir. 2002) 24

Sampsell v. Imperial Paper and Color Corporation,
313 U.S. 214, 85 L.Ed. 1293 (1941) 10

Securities and Exchange Commission v. Recile,
10 F.3d 1093 (5th Cir. 1993) 3

Standard Supply Company v. Cohen,
701 F.2d 978 (1st Cir. 1983) 14

U.S. v. the Schooner Sea Witch,
73 U.S. 786 (1868) 10

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235, 109 S.Ct. 1026,
103 L.Ed.2d 290 (1989) 13

United States v. Tabor Court Realty Corp.,
803 F.2d 1288 (3rd Cir. 1986) 8

Statutes:

11 U.S.C. §67 7

11 U.S.C. §544 . . . . . 6, 7, 24

11 U.S.C. §548 . . . . . *passim*

11 U.S.C. §550 . . . . . 2, 13, 14

28 U.S.C. §157 1

28 U.S.S. §158 1

28 U.S.C. §1254 1

28 U.S.C. §1334 1

LSA-C.C. Art. 2040 . . . . . 2, 24

Statute of 13 Elizabeth C.5 (1570) 10

Other:

Advisory Committee Notes to F.R.E. 201 26

Fed. R. Evid. 201 2

U.S. Const. amend V 1

Sup.Ct. R. 10 28

Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

Hayes v. Jimmy Swaggart Ministries (In re Hannover Corp.), 2002 U.S. App. LEXIS 24649 (5th Cir. 2002).

Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.), 310 F.3d 796 (5th Cir. 2002).

Hays v. Jimmy Swaggart Ministries, 263 B.R. 203 (M.D. 1999).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1) as a result of the Fifth Circuit's denial of Hays' Petition for Rehearing on November 27, 2002. The jurisdiction of the Fifth Circuit Court of Appeals was based upon 28 U.S.S. §158(d), the United States District Court for the Middle District of Louisiana had jurisdiction based upon 28 U.S. §158(a). The original jurisdiction of the United States Bankruptcy Court for the Middle District of Louisiana was based upon 28 U.S.C. §1334 and 28 U.S.C. §157.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 USCS §548 (2003)

(See Appendix G for text.)

11 USCS §550 (2003)

(See Appendix G for text.)

Fed. R. Evid. 201

(See Appendix G for text.)

LSA -- C.C. art. 2040. Contract made in course of business

An obligee may not annul a contract made by the obligor in the regular course of his business.

STATEMENT OF THE CASE

This case is a bankruptcy fraudulent conveyance action filed by Williams G. Hays Jr., Equity Receiver and Chapter 11 Disbursing Agent, on behalf of the Chapter 11 debtors, Hannover Corporation of America, Redwood Raevine Corporation, Rubicon XXI Corp., Place Vendome, Inc., Place Vendome Corp. of America, Penzance, Inc. and ATG, Inc., against Jimmy Swaggart Ministries ("JSM"). The debtor corporations were the creation of Sam J. Recile, who

used them in a massive fraudulent scheme in which the debtors borrowed more than $15 million from scores of individuals throughout the country by issuing promissory notes promising short term returns (30 to 60 days) of 100% or more. The debtor corporations raised the money between August 1990 and August 1992 in connection with Recile's promotion of the "Place Vendome Mall Shopping Center," which he proposed to build in Baton Rouge, Louisiana, on land to be acquired from JSM and several other landowners. The lower courts recognized that acquisition of land from JSM was essential to the project and borrowing money.

In April 1991 the Securities and Exchange Commission ("SEC") filed an enforcement action in the United States District Court for the Eastern District of Louisiana, against Recile, his girlfriend and two of his corporate entities, seeking an injunction, civil penalties and disgorgement of all unlawfully obtained funds. *See*, *Securities and Exchange Commission v. Recile*, 10 F.3d 1093 (5th Cir. 1993). The district court immediately entered a temporary restraining order, and in May 1991, a preliminary injunction, prohibiting further violations of the securities laws, freezing most of the defendants' assets, and appointing a special master to trace all money borrowed. The preliminary injunction permitted the named corporate defendants to continue to seek permanent financing for the project and to pay to extend options to buy the property. But the injunction froze all of the defendants' accounts except two specific bank accounts and required the defendants to submit weekly expense reports to the SEC and the special master.

To circumvent the effort by the court to monitor the named defendants' ongoing activities, Recile secretly created new corporate entities to continue his unlawful money-raising, even after the district court's preliminary injunction.

Thereafter, Recile used the new entities to defraud unsuspecting investors, many elderly, in excess of $7 million more. These new entities were the source of all but the first $250,000 of the more than $1.5 million paid to JSM within a year of the debtors' bankruptcy.

On July 29, 1992, the district court in the enforcement action entered a permanent injunction placing Recile's corporate entities (including the newly-formed ones) in equity receivership and enjoining Recile and others from further violations of the securities laws. On September 23, 1992, the companies' receiver, Hays, filed a Chapter 11 bankruptcy proceeding on their behalf in the United States Bankruptcy Court for the Middle District of Louisiana.

In their adversary complaint against JSM under §§544 and 548 of the Bankruptcy Code, the debtors sought recovery of $2,472,500 paid to JSM in exchange for multiple short-term agreements ("options") granting the right to fund the purchase price of JSM's undeveloped land under a series of real estate sale instruments placed in escrow. Pl. Exh. C-180.[1]

The parties signed the escrowed sales in "no money closings" and agreed that the respective acts of sale could be released from escrow and recorded only upon JSM's receipt of the cash down payment by the stated deadline. Terms of the agreements varied, including the stipulated purchase price, the prospective buyer entity, the durations of the "options," and their cost to the debtors. *Id.* The options ranged from

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[1] The bankruptcy court chronicled these different transactions at BCF 22, 24, 26,27, 34-36, 46, 49, 50, 54, 55, 56, 62,67,73,81-84,88,97,100,108,117,118,121,123,124,125, 129, 130,132,133 and 136.

six-months at a cost to the debtors of $300,000 in 1990, to one day extensions conditioned on the payment of $10,000 "per banking day"during the final seven months of the transfers. While receiving these daily payments, JSM actively marketed the same land for sale to third parties. Bankruptcy Court Finding ("BCF") 117-122, Bankruptcy Court Opinion ("BC"), Appendix p. 130a.

Recile used copies of the fully executed but escrowed sales, as well as copies of phoney loan commitments, to mislead investors into believing his project owned the land and had obtained permanent financing to build the shopping mall. Recile used his newly-created corporate entities and new, undisclosed, bank accounts in their names to conceal from the district court the daily payments made to JSM during the final seven months and the continued issuance of the companies' double-your-money-back promissory notes.[2] Included in the debtors' §548 claim was $50,000 paid after and in violation of the permanent injunction placing the debtors in receivership. BCF 151-152.

The debtors were at all times insolvent. BC Opinion, Appendix p. 124a. The companies' liabilities were always more than double the amount of money they had raised. *Id.* They never owned unencumbered assets having more than nominal value. Recile and his corporate entities never obtained any legitimate commitment to finance the project. *Id.* By the time the district court placed the debtor corporations in equity receivership, all but $6,000 of the $15 million raised was gone.

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[2] None of the payments that were the subject of the §548 claim came from either of the bank accounts authorized in the preliminary injunction. BCF 136-140.

The bankruptcy court tried the case on the merits and rendered judgment in favor of JSM and against Hays on all claims. In its Reasons for Judgment, the bankruptcy court supported its decision that the transactions between the debtors and JSM were made in the ordinary course of business (a defense to the debtors' §544 claim based on state law) by stating:

> Recile, in one corporate form or another, has been taking options, executing contracts to buy and sell, and purchasing real properties for development and/or improvements in Louisiana for over 30 years. See supra note 9, at 58. He is the quintessential wheeler/dealer real estate promoter and developer. Paying sums for options was a regular part of his business. Thus, transfers may not be annulled by the revocatory action.
>
> BC Opinion at p. Appendix p. 134a.

Note 9, referred to by the bankruptcy court, states: "Recile was recognized almost 30 years ago as a dynamic and aggressive real estate promoter and financial wizard who had acquired numerous pieces of valuable real estate in Louisiana while still in his twenties" citing *In re Southern Land Title Corp*, 301 F.Supp. 379, 384, 414 (E.D. La. 1968).

The district court reversed the bankruptcy court's decision on all counts and remanded to the bankruptcy court for a determination of the amount of the fraudulent transfers. On review of the bankruptcy court's decision on remand as to the amount of the judgment, the district court granted Hays request for prejudgment interest and denied JSM's appeals.

JSM appealed to the Fifth Circuit, but did not list the district court's reversal of the bankruptcy court's initial holding after trial that JSM proved an ordinary course of business defense to Hays' §544, state law-based claim. Neither party briefed the ordinary course of business defense issue in the court of appeals. The Fifth Circuit reversed the district court's decision and reinstated the original bankruptcy court's judgment, holding that JSM had proven both a §548(c) defense and a state law ordinary course of business defense to the §544 claim. The Fifth Circuit denied Hays' petition for rehearing en banc.

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH EVERY OTHER CIRCUIT DECISION TO ADDRESS THE ISSUE OF GOOD FAITH BECAUSE INSTEAD OF USING AN OBJECTIVE STANDARD TO REVIEW GOOD FAITH, IT USED EITHER NO STANDARD OR A SUBJECTIVE ONE.

This Court has required that a defendant/transferee prove objective good faith in defense of a bankruptcy fraudulent transfer case. *Harell v. Beall*, 84 U.S. 692 (1873) (Since transferee "shut his eyes to the truth and has such notice and information as made it his duty to inquire further" his good faith defense to a bankruptcy fraudulent transfer claim was denied). Similarly, all seven circuits that have considered the issue have adopted an objective standard for good faith under §548(c) or its predecessor, §67(d)(6) of the Bankruptcy Act. *Brown v. Third National Bank (In re Sherman)*, 67 F.3d 1348, 1353 (8th Cir. 1995); *Huffman v. Commerce Security Corp. (In re Harbour)*, 845 F.2d 1254, 1258 (4th Cir. 1988); *In the Matter of Steel Structures, Inc.*, 466 F.2d 207, 215-216 (6th Cir. 1972) (discussing 67(d)(6)

under the Act -- now 548(c)); *In re Agricultural Research and Technology Group,* 916 F.2d 528, 535-536 (9th Cir. 1990); *In re M & L Business Machine Co., Inc.*, 84 F.3d 1330, 1335, 1338 (10th Cir. 1996), *cert. denied* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996); *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1297, nt. 3. (3rd Cir. 1986); and *In re Allied Development Corporation,* 435 F.2d 372, 375 (7th Cir. 1970). In spite of ample legal precedent recognizing an objective standard for good faith, the Fifth Circuit decision erroneously states that there "is little agreement among courts regarding the appropriate legal standard for this defense" relying on Colliers on Bankruptcy and its own refusal to craft a definition for good faith. Fifth Circuit ("FC") Opinion, Appendix pp. 11a-12a.

All of these circuits recognize that a transferee acts in bad faith when he has sufficient knowledge to place a reasonably prudent person on notice of the debtor's possible insolvency or fraud, but does nothing. Here, the Fifth Circuit avoided articulating an objective or subjective standard by which to evaluate good faith, based upon its reluctance to give good faith a definition. Consequently, it reviewed the bankruptcy court's conclusions using a subjective standard or no standard at all, when it looked at "the transferee's state of mind." FC Opinion, Appendix pp. 11a-12a. Without an objective reasonable-person standard imposing a duty to inquire, transferees in the Fifth Circuit will nearly always be in good faith, if they do not want to know of fraud or insolvency.

Further, to find good faith, the court looked only at JSM's subjective knowledge and events occurring outside of

the one year period covered by Hays' §548 claim.[3] Neither the Fifth Circuit nor the bankruptcy court considered whether, at any time within the one-year period during the course of accepting payments from the debtors, JSM acquired sufficient knowledge to place JSM on notice of the debtors' insolvency or fraud such that JSM was objectively in bad faith at the time of each particular transfer of cash. This failure to apply an objective standard to each transfer at issue under §548 conflicts with case law from every other circuit that has considered the issue.

II. THE FIFTH CIRCUIT'S DECISION ON VALUE CONFLICTS WITH DECISIONS OF THIS COURT, THOSE OF THE THIRD, FOURTH, AND ELEVENTH CIRCUITS, VIOLATES THE PLAIN LANGUAGE OF SECTION 548, AND IGNORES THE POLICY SUPPORTING FRAUDULENT TRANSFER LAW SINCE ELIZABETHAN TIMES.

The purpose of fraudulent transfer law is preservation of the debtor's estate for the benefit of its unsecured creditors.[4] Put another way, the goal is to prevent diminution

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[3] In reviewing the bankruptcy court's support for finding good faith, the Fifth Circuit pointed to the bankruptcy court's finding that JSM inquired of the district court as to whether the debtors could make payments to extend the options, an event that occurred more than one year prior to the bankruptcy according the bankruptcy court's findings. FC Opinion, Appendix p. 11a, BCF 112, 151, and BC Opinion, pp. 128a-129a.

[4] The principle underlying §548 has shaped fraudulent transfer (continued...)

of the debtor's estate in prejudice to unsecured creditors rights. Fundamental to the analysis under both §548(a)(2)[5] and (c) is what the debtor received in the transfer, as both provisions clearly state. Subsections 548(a)(2) and (c) require that value be given to the debtor; therefore, by the plain terms of the statute, the focus in connection with value remains on what the debtor received - not just what the defendant gave up.

In addition to ignoring whether the debtor received any benefit from the options, the court never determined the amount of value, if any, represented by the intangible rights acquired through the options. "Because such intangibles are technically not within §548(d)(2)(A)'s definition of "value," courts have struggled to develop a workable test for reasonably equivalent value." *RML*, 92 F.3d at 148. This struggle exists because, unlike tangible property, intangible property is generally contractual, usually conditional, and often limited in time. In the case of transfers of tangible assets alone, what the debtor received is always what the transferee gave up. But transfers of intangible rights do not always result in an equation in which both sides balance. Nevertheless, no distinction between tangible and intangible property is made in §548's definition of value, and the question of whether any intangible rights gained by the debtor

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[4](...continued)
law and bankruptcy law since the time of Queen Elizabeth I. See, Statute of 13 Elizabeth C.5 (1570); *U.S. v. the Schooner Sea Witch*, 73 U.S. 786, 787-789 (1868); *Sampsell v. Imperial Paper and Color Corporation*, 313 U.S. 214, 217-218, 85 L.Ed 1293,1297 (1941); and *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 540, 114 S.Ct. 1757, 1763, 128 L.Ed. 556 (1994).

[5] In 1998, §548(a)(2) was redesignated as §548(a)(1)(B)(i).

have any value must be asked and answered under the plain language of §548.

In addition to disregarding the plain language of §548, the Fifth Circuit decision conflicts with its sister circuits in two ways. First, the Fifth Circuit deemed irrelevant the question of whether the debtors received any economic benefit from the options, effectively writing out of §548(c) the clause "to the debtor." Second, using hindsight to collapse the more than 11 different extension or option agreements and escrowed closings into one transaction covering more than 26 months, the Fifth Circuit approved a valuation methodology focusing on JSM's lost opportunity costs and other factors, rather than the monetary value of the intangible rights given to the debtors at the time of each transaction.

A. The Fifth Circuit Decision Conflicts with Decisions of this Court and Other Circuit Courts by Failing to Apply the Plain Language of §548(c) Requiring Proof of a Benefit to the Debtor.

Logic and the language of §548 mandate that the same test be used to value what was given to the debtor consistently throughout §548. Like §548(a)'s reasonably equivalent value test to determine whether the transfers can be avoided in the first instance, §548(c) requires an exchange equivalency review to determine if the defendant/transferee can keep any property it received in the avoided transfer.[6] If the trustee

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[6] The Fifth Circuit recognized that the value of what the defendant gave to the debtor in the transfer (as they frame the question: "did

(continued...)

proves actual or constructive fraud under §548(a), a defendant/transferee who acted in good faith can only keep property "to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation." §548(c). Nevertheless, the Fifth Circuit disregarded the plain language of §548(c) in finding that what the debtor received is not the focus under §548(c). The court held that the only concern under §548(c) is "for the transferee's side of the exchange, not the transferor's gain." FC Opinion, Appendix p. 16a. Applying this reasoning to the valuation of intangible contract rights "given" by the defendant, the court declared that "a transferor's practical inability to exercise his option is irrelevant to its valuation under §548(c)." Effectively, the Fifth Circuit rewrote §548(c) to allow a transferee a defense "to the extent that such transferee or obligee gave [up] value in exchange for such transfer or obligation."[7]

Under this Court's long-standing precedent, the Fifth Circuit should have looked to the plain language of the statute to determine whether §548(c) required proof of a benefit to the debtor. It did not consider this Court's long-standing precedent in failing to do so. *See, Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1,6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) ("[W]hen the statute's language

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[6](...continued)
the transferor receive enough") is the focus of the "reasonably equivalent value" analysis in §548(a)(2) (referred to herein for convenience as "§548(a)"). FC Opinion, Appendix p. 15a-16a.

[7] The district court evaluated whether the debtor received value under §548(c) and the underlying principle that §548 seeks to rectify diminution of the debtor's estate for the benefit of unsecured creditors in holding that JSM had not proven its §548(c) defense.

is plain, 'the sole function of the courts' -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms") (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)) (internal quotations omitted); *Connecticut Nat'l Bank v. Germain* 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("When the words of a statute are unambiguous, then, this first cannon is also the last: 'judicial inquiry is complete.'") (citations omitted).

If the Fifth Circuit was construing the plain language of the statute, then its decision conflicts in principle with *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890 (7th Cir. 1988) which specifically recognized that the plain language of the §548(c) requires proof that value flow to the debtor as part of the defense. In rejecting the argument that the subsequent transferee was not required to prove that value was received by the debtor (as opposed to third parties) under §550, the Seventh Circuit contrasted the language of §548(c) from the language in §550(b)(1) which:

> ...does not say "value to the debtor"; it says "value." A natural reading looks to what the transferee gave up rather than what the debtor received. Other portions of the Code require value to the debtor. Section 548(c), for example, gives the initial recipient of a fraudulent conveyance a lien against any assets it hands back, "to the extent that such transferee...gave value to the debtor in exchange for such transfer." The difference between "value" in §550(b)(1) and "value to the debtor" makes sense....
>
> *Bonded*, 838 F.2d at 987.

Likewise, statutory interpretation principles recognize that if Congress intended for courts to look only to what the defendant/transferor gave up without determining whether there was a benefit to the debtor, as the Fifth Circuit held, it would have omitted the phrase "to the debtor" as it did in §550(b)(1).

Value received by the debtor is still the focus under §548(c) for good reason. Lack of reasonably equivalent value is not the only basis for proving a fraudulent transfer claim under §548(a). Section 548(a)(1) allows a trustee to avoid a transfer made with actual intent to hinder, delay, and defraud creditors. No part of §548(a)(1)'s actual fraud test is concerned with the value of the exchange. The question of value, or put another way, concern with diminution to the debtor's estate, arises only in the context of the §548(c) defense. In this case, the bankruptcy court found as a matter of fact that the transferors "acted with the intent to hinder, delay, and defraud investor/creditors of Hannover/Place Vendome in effecting transfers to JSM." BCF 109.[8] Thus, evidence quantifying the benefit given to the debtor was not necessary to avoid these transfers under §548(a).

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[8] A court's finding of actual fraud under §548(a) is a factual finding. *Standard Supply Company v. Cohen*, 701 F.2d 978 (1st Cir. 1983). Furthermore, the Fifth Circuit panel agreed that the debtor corporations were "insolvent *ab initio*," that "they also made fraudulent representations to investors," the fraudulence "pertained to the land deal itself, not to some unrelated transaction," and "without an option on JSM's land, Recile could not have perpetrated his fraud upon his investors. The transferor was engaged in a crooked scheme." FC Opinion, Appendix p. 11a.

In cases of actual fraud, the only mechanism to measure the value received by (given to) *the debtor* is §548(c), not §548(a), contrary to the discussion at Appendix pages 16a through 18a of the Fifth Circuit Opinion. Here, the Fifth Circuit went so far to state that the protection of creditors' interests (did the debtor receive enough) is important only in the "reasonable equivalent value" test in §548(a). FC Opinion, Appendix p. 16a. But where there is actual fraud under §548(a), why should the creditors get less protection than when they are victims of constructive fraud? The Fifth Circuit's interpretation of §548(c) to eliminate the directional element "gave value to the debtor" effectively neuters the avoidance power of §548 in actual fraud cases involving intangible contract rights, a result completely inconsistent with the plain language of the statute.

B. The Fifth Circuit Decision Conflicts With the Third, Fourth, and Sixth Circuits Tests for Value under §548 in Looking at JSM's Lost Opportunity Costs and Who Proposed the Options' Timing as Proof of Value, Instead of the Probabilities that the Options Could be Exercised Before They Expired and the Monetary Value of Any Such Probabilities.

If this case had been tried in the Third Circuit, the monetary value of the chance that the debtor could exercise the options, not JSM's lost opportunity costs, would have been the measure of the what JSM actually gave to the debtor. In *In re R.M.L., Inc.*, 92 F.3d 139 (3rd Cir. 1996), the Third Circuit used a two prong test to determine whether and how much value was given by the defendant to the debtor when the

"property" given, a loan commitment, was intangible and contingent.[9] First, the court determined whether any chance of an economic benefit whatsoever was conferred on the debtor. If any chance of a benefit was found, then the Third Circuit required that the chance be quantified.

In contrast, the Fifth Circuit looked at JSM's lost opportunity costs, whether the transferee proposed the arrangement, and the fair market value of the real estate.[10] The court then concluded that JSM gave up value without ever determining whether what JSM gave up had even a chance of conferring a benefit on the debtors, and if so, how much.

Since the question of whether the defendant/transferee gave value to the debtor under §548(c) and the question of whether the debtor received value under §548(a) is the same, the Fifth Circuit holding regarding the test for whether the debtor was given value conflicts with *RML*.[11] Furthermore,

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[9] In *RML*, the court reviewed the value given in the context of §548(a)'s "reasonably equivalent value" test. Since value is the same under 548(a) and (c), the test for both should be the same.

[10] In the valuation methodology approved by the Fifth Circuit, JSM's expert compared the total "return" realized by JSM over the 26 month period (using the agreed sales price as JSM's "investment") to the return JSM would have received had it invested an equivalent amount of cash in corporate bonds. The expert admitted he did not attempt to value any individual option, nor did he consider the distinct duration and cost of each option. This methodology evidences only the cost of JSM's lost opportunities or JSM's economic costs. BCF 157.

[11] The Fifth Circuit recognized that §548(a) and (c) are complimentary, yet it failed to apply the same test for value in this

(continued...)

the Third Circuit criticized exactly the analysis undertaken by the Fifth Circuit in the present case regarding the proper focus under §548 for value to the debtor.

> There will be rare occasions when a debtor exchanges cash for intangibles that have no "value" at the time of the transfer. A court that relies on the fair market value of those intangibles (or the arm's length nature of the transaction) as the exclusive test for "value" would erroneously conclude that value was conferred simply because the debtor parted with "the going rate," even though the debtor received nothing in return.
>
> *RML*, 92 F.3d at 149.

The Third Circuit's observation on this point is correct. By looking at factors other than whether the debtors received a benefit, the Fifth Circuit erroneously concluded that JSM gave up value when the debtors received nothing of value.

In the present case, the district court held that the short term, mostly day-to-day extensions given by JSM were effectively terminable at JSM's will and therefore conferred

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[11](...continued)
case as it used under §548(a) to determine value: "whether the investment conferred an economic benefit on the debtor." *Matter of Fairchild Aircraft Corporation*, 6 F.3d 1119, 1127 (5th Cir. 1993) citing *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). FC Opinion, Appendix p. 16a.

no economic benefit on the debtors.[12] The Fifth Circuit rejected this reasoning because JSM agreed to the daily payment arrangement only because Recile proposed it. FC Opinion, Appendix p. 16a, nt. 2. The court's analysis stopped at the conclusion that in the abstract, options have value. It failed to ask the questions central to any determination of the monetary value of a one-day option: What were the chances that the market value of the real estate would increase during the one banking day term of the option, and could the debtors possibly have exercised or sold any of the options before they expired?

In the Third Circuit, "while the chance of receiving an economic benefit is sufficient to constitute value, the size of the chance is correlated with the amount of value conferred." *RML,* 92 F.3d at p. 153. *RML* reflects the Third Circuit's analysis that where the intangible rights given are highly conditional, they have little value. *RML*, 95 F.3d at 154. Similarly, the Fourth and Sixth Circuits recognize that §548 requires that contingent or conditional intangible rights be valued by recognizing the chance associated with the intangibles, without using hindsight to allow the ultimate outcome to color the analysis. *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990)(valuation of stock in company whose sole asset was a pending FCC license application granted solely by lottery); *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769 (6th Cir. 1995)(valuation of debtors' wagers at transferee casino's blackjack tables). But the Fifth Circuit's decision relieved the

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[12] The district court also held that JSM's analysis was legally flawed because an option is not the same as an investment or "loan" of the underlying asset. *Hays,* 263 B.R. at 212. The Fifth Circuit panel did not discuss this aspect of the lower court's ruling.

defendant/transferee of the burden, imposed by the Third and Sixth, of quantifying the probability that each option would result in an economic benefit to the debtors before it expired.

Hays is not suggesting, as the Trustee did in *Financial Federated v. Kozyak,* 309 F.3d 1325 (11th Cir. 2002), that to reverse the Fifth Circuit's decision, this Court must adopt a per se rule that because the debtors were engaged in a ponzi scheme, the options had no value to the debtors. Rather, Hays is asserting that the Fifth Circuit decision excused JSM and all future defendants in that circuit from presenting any evidence under §548(c) of a realizable benefit to the debtor or its creditors from intangible property given in exchange for fraudulent transfers of the debtor's property. The record reflects JSM presented no evidence proving any probability that the debtors could exercise the options or that the debtors could have realized value in some other way, such as by selling the options. The Fifth Circuit decision excused this failure.

Examining value from the defendant/transferee's perspective, the Fifth Circuit mischaracterized the purpose of §548(c) as protection of transferees. FC Opinion, Appendix p. 15a. In contrast, *RML* plainly held that value is viewed from the standpoint of neither the debtor nor the defendant/transferee, but of the debtor's creditors. Only *RML's* analysis protects creditors from an "irresponsible debtor [who] invests in a venture that is obviously doomed from the outset." *RML,* 92 F.3d at 152.

To use value as perceived by the transferee as a proxy for a "probability of success to the debtor" analysis will not protect creditors in circumstances in which the intangible right received cannot be sold or marketed, and the only realizable benefit consists of the possibility that the market price for the

property might increase or the possibility that the debtors would exercise their rights under the agreement before it expired. The Third Circuit requires that the "possibility" be quantified in terms of "probabilities" from an objective standpoint, as of the time of the transfer. The Third Circuit's approach, not the Fifth's, is consistent with the language "gave value to the debtor" in §548(c).

Finally, in failing to require quantification of the dollar value of each option, the Fifth Circuit erased the requirement in the plain language of §548(c) that the defendants can keep what they received from the debtor only "to the extent" that the debtor received value in return. This absence of quantification conflicts with cases from four other circuits reading the words "to the extent" to require proof of a precise dollar amount. *See*, *In re West Dor, Inc.*, 996 F.2d 237, 242-3 (10th Cir. 1993) (rejecting good faith transferee's argument it could retain entire amount transferred, because transferee failed to offer any evidence quantifying the amount of indirect benefits it claimed to have given); *Covey v. Commercial National Bank of Peoria, et al.*, 960 F.2d 657, 662 (7th Cir. 1992); and *In re Grand Chevrolet, Inc.*, 25 F.3d 728, 733 (9th Cir. 1994) [construing "to the extent" language in §547(c)(1)]; *In re Jet Florida Systems, Inc.*, 861 F.2d 1555 (11th Cir. 1988) (the "to the extent" language in §547(c)(1) requires transferees to prove "with specificity" the amount of the new value given to the debtor, and that "[t]he proper inquiry...should be directed at the valuation of the transfer when made.") (Emphasis in original.)

III. SUBSTANTIAL POLICY REASONS EXIST FOR REVIEWING THE FIFTH CIRCUIT'S DECISIONS ON VALUE AND GOOD FAITH.

Corporate fraud against creditors can take many shapes and forms. According to recent news accounts and testimony before Congressional committees, failing companies have fooled lenders and public investors by attributing far more value to intangible assets than economic reality would support. Often the complex transactions in which those intangibles were acquired served no purpose but to artificially inflate the company's balance sheet. The Fifth Circuit, itself, is the home of two companies that are responsible for the largest corporate bankruptcies in the nation's history. In both, as well as in a number of other high profile corporate failures, highly suspect commercial transactions involving contract rights and other intangibles are the focus of criminal investigations, Congressional inquiry, and civil litigation. In this era of corporate scandal and accounting fraud, the issues raised in Hays' §548 claim could not be more timely.

The Fifth Circuit's approach to value and good faith under §548 effectively subordinates the interests of the company's creditors to those of third party "trading partners," who take the company's money in exchange for what in reality could be an illusory promise. The Fifth Circuit's opinion opens a very large loophole in bankruptcy fraudulent conveyance law, not recognized by any other circuit, for pre-bankruptcy exchanges involving intangibles. In bankruptcy courts following the Fifth Circuit's analysis, even transfers by a debtor made with the actual intent to defraud creditors will be immunized from a trustee's recovery under §548, if the transferee shuts its eyes to the debtor's fraud and can demonstrate that the intangibles had value from the

transferee's perspective. Absent from the analysis is any concern for what benefit the defrauded creditors received and whether the transferee truly was in good faith, from an objective, duty-to-inquire standpoint.

The instant case illustrates the perverse outcome, at odds with the Bankruptcy Code's policy of protecting creditors, that results from the Fifth Circuit's analysis of value and good faith. The Fifth Circuit's decision allows JSM to keep even the $50,000 it received after the permanent injunction enjoined the debtors from doing anything with their property but turning it over to the receiver. While JSM was being paid by Recile the $50,000, the debtor entities, through their receiver, were completely unaware the payments were being made. Even if the receiver had known, the debtors could not have bought JSM's property. JSM's counsel received a copy of the permanent injunction by fax, but the court did not even consider whether JSM was in a better position than the creditors to know the payments were prohibited. The absence of an objective standard of good faith, combined with focusing the value analysis on the transferee and its losses, resulted in the decision permitting JSM to keep the $50,000. The court gave no consideration to the innocent creditors, whose interest were supposed to have been protected by the language of §548 and the policy behind it.

Here, far more than the individual victims of Recile's scheme, JSM was in the best position to make appropriate inquiries into the legitimacy of the payments, especially when JSM began receiving daily hand delivered bundles of cash and investor checks endorsed to JSM. Economically, the day-to-day options were virtually risk-free to JSM; all JSM promised to do in exchange for the payments was to conclude the sale of its real estate upon receipt of the agreed purchase price

within the next 24 hours. In the meantime, JSM continued to market its land to legitimate developers. BCF 117-122. The policies underlying the bankruptcy laws are ill-served by a statutory construction that effectively ignores the interests of the creditor-victims of the fraud in cases such as this.

IV. THE FIFTH CIRCUIT COURT OF APPEALS VIOLATED HAYS' DUE PROCESS RIGHTS BY OVERTURNING THE LOWER COURT DECISION BASED UPON AN ISSUE NOT RAISED BY JSM ON APPEAL, NOT BRIEFED BY EITHER PARTY AND SUPPORTED ONLY BY THE BANKRUPTCY COURT'S IMPROPER JUDICIAL NOTICE OF FACTS OUTSIDE THE RECORD.

A. Hays' Due Process Rights Were Violated When The Fifth Circuit Ignored A Consistent Line Of Procedural Cases Instructing that All Issues Not Raised On Appeal Are Abandoned.

"When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" *Bouie v. City of Columbia*, 378 U.S. 347,354, 84 S.Ct. 1697,1703, 12 L.Ed.2d 894, 900 (1964) *citing Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 74 L.Ed. 1007 (1930).

At the time of JSM's appeal from the district court's judgment, a cardinal principle of appellate review in the Fifth Circuit was, "An appellant abandons all issues not raised and argued in its initial brief on appeal." *P&G v. Amway Corp.*, 242 F.3d 539, 555 (5th Cir. 2002). The district court affirmed the bankruptcy court's conclusion that, on his §544 claim, Hays met his burden of proving the Louisiana Revocatory Action, but reversed the holding that JSM proved an ordinary course of business defense to it (LSA-C.C. art. 2040). *Hays*, 263 B.R. at 213-14. In its appeal to the Fifth Circuit, JSM neither listed this holding rejecting its Article 2040 defense nor briefed it (neither did Hays). At oral argument, JSM contended that its Article 2040 defense was identical to a §548(c) defense, which was briefed. The Fifth Circuit correctly held they were different. FC Opinion, Appendix p. 19a.

Nevertheless, the Fifth Circuit reinstated the bankruptcy court's judgment upholding JSM's state law ordinary course of business defense to Hays' §544 state law-based claim. The court did so without giving Hays notice or affording him opportunity to brief or argue the merits of the ordinary course of business defense. In reinstating the bankruptcy court decision on this issue, the Fifth Circuit ignored, without discussion or analysis, the scores of its own cases articulating its well-settled rule that to obtain relief on appeal, the appellant must raise the issue and brief it. As set forth below, this denial of basic procedural due process compounded a denial of Hays' due process rights that occurred at the trial court level.

B. Hays' Fifth Amendment Due Process Rights Were Violated When The Bankruptcy Judge Took Judicial Notice Of A 27-Year Old Case In Which Neither Hays Nor The Debtors Were Parties, And Without Giving Hays An Opportunity To Present Evidence To Contradict The Judicially Recognized Facts Outside The Record Which Provided The Sole Support For Granting JSM's Ordinary Course Of Business Defense.

The Fifth Circuit determined that JSM proved an ordinary course of business defense to the Louisiana Revocatory Action. In addition to violating long-standing precedent as discussed above, the appellate court relied on the bankruptcy court's findings which were based on facts unilaterally assumed by the bankruptcy court from a 27-year old case in which neither Hays nor the debtors were a party and without giving Hays the opportunity to present contradictory evidence. Absolutely no evidence was presented by either party at trial regarding Recile's business background nor to support the finding that taking options was part of Recile's ordinary course of business.

The bankruptcy court's reliance upon the 27-year old case surfaced for the first time in the bankruptcy court's reasons for judgment. In fact, the only mention during the trial of Recile's previous business practices was the bankruptcy court's comment in response to an objection by Hays' counsel to a question by JSM regarding Recile's enthusiasm for the mall project. The court stated "From past history and past testimony and all my other knowledge and

contacts, I think I can probably take notice that Sam J. Recile was enthusiastic about every project he ever went into." December 12, 1994 transcript p. 45, 1-18.

The bankruptcy court's action in taking judicial notice of facts not in evidence known only to the trial judge and of facts of a case involving none of the parties before the trial court violates this Court's decisions in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct 1434, 28 L.Ed.2d 788 (1971) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct 645, 58 L.Ed.2d 552 (1979). It is a due process violation of the Fifth Amendment to the U.S. Constitution "for a judgment to be binding on a litigant who was not a party or privy and therefore has never had an opportunity to be heard." *Id. See also, Goldberg v. Kelly,* 397 U.S. 254, 269, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1969) (The fundamental requirements of due process require notice and opportunity to defend at a meaningful time and in a meaningful manner including confronting any adverse witnesses and presenting one's own evidence and arguments). Most importantly, unlike *Blonder-Tongue* or *Parklane Hosiery*, JSM did not assert the 1968 *Southern Land Title* case or its facts as evidence supporting JSM's ordinary course of business defense. Rather, the bankruptcy court unilaterally took judicial notice of facts not supported by the very case it cited.[13]

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[13] Even under the Fifth Circuit precedent and the Federal Rules of Evidence, the bankruptcy court's action was not authorized. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982) (Judicial notice of facts outside record is appropriate where such facts are "self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities."); *see also* Advisory Committee Notes to F.R.E. 201. Recile's business

(continued...)

Here, the issue of what was within the debtors' regular course of business was the ultimate issue to be decided. The bankruptcy court relieved JSM of its burden of proving this defense by taking "notice" of facts outside the record known only to the bankruptcy judge or contained in a court opinion reported twenty-seven years earlier. Because there were no other facts in the record to support that Recile regularly took options as suggested by the bankruptcy judge, and then the appellate court violated its own procedure by considering an issue not raised in the Fifth Circuit by either party, the Fifth Circuit's decision that JSM proved an ordinary course of business defense to the Louisiana revocatory action should be reversed.

CONCLUSION

Bankruptcy laws were designed to protect creditors, such as the ponzi-scheme victims in this case, many of whom were elderly, and the creditor victims of the well-publicized corporate scandals recently in the news. The Fifth Circuit opinion in this case turns that policy on its head and distorts the meaning of the plain language of §548.

When other courts that have not addressed issues of valuation and good faith under §548(c), like the Second Circuit where the Enron bankruptcy case is pending, which standards and tests will they use? There is presently a conflict among the circuits and no guidance from this Court on §548's good faith and valuation elements. For this reason alone, this case warrants review by this Court.

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[13](...continued)
practices in the intervening 30 years were not 'self-evident.'

However, in addition to creating a conflict among circuits, the Fifth Circuit's decision violated Hays' Fifth Amendment due process rights by reinstating the bankruptcy court's decision, which also violated Hays' constitutionally protected due process rights. This reason alone supports review by this Court. Viewed together, the errors committed by the Fifth Circuit and the conflicts it created support all of the grounds identified in Sup.Ct. R. 10 for review by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30454, 01-30455

[Filed November 27, 2002]

In The Matter Of: HANNOVER CORPORATION; REDWOOD RAEVINE CORP; RUBICON XXI CORP; PLACE VENDOME, INC; PLACE VENDOME CORPORATION OF AMERICA; PENZANCE, INC; ATG, INC, Debtors;	)
JIMMY SWAGGART MINISTRIES, Appellant	)
v.	)
WILLIAM G HAYES, JR, Appellee;	)
In The Matter Of: HANNOVER CORPORATION; REDWOOD RAEVINE CORP; RUBICON XXI CORP; PLACE VENDOME, INC; PLACE VENDOME CORPORATION OF AMERICA; PENZANCE, INC; ATG, INC, Debtors;	)
WILLIAM G HAYES, JR, Appellee	)

v.)
)
JIMMY SWAGGART MINISTRIES, Appellant; In)
The Matter of: HANNOVER CORPORATION;)
REDWOOD RAEVINE CORP; RUBICON XXI)
CORP; PLACE VENDOME, INC; PLACE)
VENDOME CORPORATION OF AMERICA;)
PENZANCE, INC; ATG, INC,)
Debtors;)
)
WILLIAM G HAYES, JR,)
Appellee)
v.)
)
GEORGE RUSSELL; JIMMY SWAGGART)
MINISTRIES;)
)
In The Matter of: HANNOVER)
CORPORATION; REDWOOD RAEVINE)
CORP; RUBICON XXI CORP; PLACE VENDOME,)
INC; PLACE VENDOME CORPORATION OF)
AMERICA; PENZANCE, INC; ATG, INC,)
Debtors;)
)
JIMMY SWAGGART MINISTRIES,)
Appellant)
v.)
)
WILLIAM G HAYES, JR,)
Appellee)
_____)

Appeals from the United States District Court
for the Middle District of Louisiana, Baton Rouge

JUDGES:
Before DAVIS, JONES and SMITH, Circuit Judges.

OPINION
ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
Edith H. Jones
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30454, No. 01-30455

[Filed October 29, 2002]

In the matter of: Hannover Corporation; Redwood Raevine Corp.; Rubicon XI Corp.; Place Vendome, Inc.; Place Vendome Corporation of America; Penzance, Inc.; and ATG, Inc.,
Debtors

JIMMY SWAGGART MINISTRIES,
Appellant,

versus

WILLIAM G. HAYS, JR.,
Appellee.

WILLIAM G. HAYS, JR.,
Appellee,

versus

JIMMY SWAGGART MINISTRIES,
Appellant.

In the matter of: Hannover Corporation; Redwood Raevine Corp.; Rubicon XI Corp.; Place Vendome, Inc.; Place Vendome Corporation of America; Penzance, Inc.; and ATG, Inc.,
Debtors

WILLIAM G. HAYS, JR.,
Appellee,

versus

GEORGE M. RUSSELL; JIMMY SWAGGART MINISTRIES,
Appellants.

JIMMY SWAGGART MINISTRIES,
Appellant,

versus

WILLIAM G. HAYS, JR.,
Appellee.

Appeals from the United States District Court
for the Middle District of Louisiana
SA-97-CV-1139
Samuel Fred Biery, Jr, US District Judge

JUDGES:
Before DAVIS, JONES and SMITH, Circuit Judges.

OPINION

EDITH H. JONES, Circuit Judge:

This is an adversary proceeding brought by William G. Hays, Jr. ("Hays"), trustee of the debtors' bankruptcy estate, to recover $2,472,500 paid by the debtors to Jimmy Swaggart Ministries ("JSM") from July 1990 to July 1992. Hays argues -- and JSM contests -- that these transfers can be avoided as actual and/or constructive fraudulent conveyances under 11 U.S.C. § 548 (a). JSM additionally claims the "good faith" defense of 11 U.S.C. § 548 (c). For the reasons that follow, this court finds that JSM met the requirements of § 548(c) and the criteria for a comparable defense under Louisiana law. Accordingly, we need not reach the other issues raised on appeal. The district court's 1999 reversal of the bankruptcy court's 1995 judgment must be reversed, and judgment must be entered in favor of JSM.

FACTS

The debtors in this case are a number of corporations created and controlled by Sam J. Recile ("Recile") for the purpose of developing a shopping mall in Baton Rouge, Louisiana. Critical to the success of this project was Recile's acquisition of a tract of land owned by JSM. In July 1990, one of Recile's corporations entered into an option agreement for purchase of a 68-acre tract of JSM's land in Baton Rouge, Louisiana. The stipulated purchase price was $11,250,000. For the next two years Recile made payments totaling $2,435,000 on this and subsequently renegotiated agreements as he sought to obtain financing for the project. No purchase ever occurred.

Although call option contracts on real estate are common enough, Recile's behavior was not. He offered to prospective investors short-term double-your-money-back promissory notes to finance his project. The nominal party on Recile's side of the option arrangement changed frequently. Payments to JSM were, in later stages of the relationship, made on a weekly or daily basis -- sometimes in cash, sometimes with counter-signed third-party checks. Most notably, Recile came under SEC investigation, a complaint being filed in April 1991 in the United States District Court for the Eastern District of Louisiana. JSM was not a party to this action.

Over the next fifteen months the supervising district judge issued a variety of orders, each of which allowed the debtor corporations to continue making payments on this and other options. Eventually, in July 1992, the court entered an order granting the SEC broad injunctive relief that, among other things, appointed Hays as receiver for the debtors. *See SEC v. Recile*, 10 F.3d 1093 (5th Cir. 1993) (affirming district court's grant of SEC's motion for summary judgment). In September 1992, Hays filed voluntary Chapter 11 bankruptcy petitions on behalf of the debtors.

In February 1994, Hays filed this action in bankruptcy court, seeking to avoid a total of $2,472,500 in pre-petition payments made by the debtors to JSM. Following an extensive bench trial with multiple witnesses, Judge Jerry A. Brown, the bankruptcy judge, ruled in favor of JSM on all of Hays's claims in this action. The court concluded that, although there was ample evidence that Recile had engaged in illegal activities, there was "no substantial evidence that JSM was a party to, knew of, or was put on notice of sufficient

facts, that it should have known of such illegal activities when it accepted the numerous transfers of money and agreed to allow the debtors to tie up valuable real estate for the lengthy amount of time here involved."

Hays appealed to the district court. Three and a half years later, that court reversed and remanded the bankruptcy court's decision. On remand, the bankruptcy court granted Hays's motion for judgment in his favor, but declined to award pre-judgment interest. On appeal, the district court reversed the bankruptcy court's denial of pre-judgment interest. JSM filed notices of appeal to this court, the district court entered an amended judgment, and JSM filed a third notice of appeal. The appeals have been consolidated.[1]

DISCUSSION

I. The district court erred in reversing the bankruptcy court's conclusion that JSM had satisfied the elements of the good faith defense under 11 U.S.C. § 548 (c).

With 11 U.S.C. § 548 (c), Congress provided to transferees a defense against a trustee's (or debtor's) successful demonstration of an actual or constructive fraudulent transfer under, respectively, § 548(a)(1)(A) and § 548(a)(1)(B) of the Bankruptcy Code. 11 U.S.C. § 548 (c) states in pertinent part:

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[1] The judgments of the district court are final for purpose of appeal.

> [A] transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

The burden of proof is on the defendant transferee. *See In re M. & L. Bus. Mach. Co., Inc.*, 84 F.3d 1330 (10th Cir. 1996); *In re Agric. Research & Tech. Group*, 916 F.2d 528 (9th Cir. 1990). To avail himself of this defense, the transferee must demonstrate that he "[took] value in good faith." To keep what he received, he must subsequently demonstrate that he "gave value."

Hays argues that Recile's corporations made actual and/or constructive fraudulent transfers to JSM under § 548(a). JSM argues that these payments were not fraudulent. It also argues, in the alternative, that it is protected by the defense provision found in § 548(c). Because this court holds that JSM satisfied the terms of § 548(c), we need not undertake an evaluation of Hays's assertion that the transfers were actually and/or constructively fraudulent under § 548(a).

A. Good Faith

In an appeal from a district court reversal of a bankruptcy court judgment, this court should "perform the same appellate review as did the district court: [the appellate court] examines the bankruptcy court's findings of fact under the clearly erroneous standard, and [the appellate court] examines that court's legal determinations under the de novo

standard." *In re Sewell*, 180 F.3d 707, 710 (5th Cir. 1999).

The dispute regarding JSM's "good faith" under § 548(c) comes to this court as a question of first impression. In the absence of clear factual error or controlling legal precedent, we decline the invitation to overturn the trial court's finding that JSM received Recile's payments in "good faith."

As courts and commentators frequently note, the bankruptcy code does not define "good faith" and the statute's legislative history is quite thin. 5 COLLIER ON BANKRUPTCY P548.07[2][a] (2002). Moreover, there is little agreement among courts as to what conditions ought to allow a transferee this defense. *Id.* This is not surprising, as the variables are manifold.

The most important set of questions concerns the transferee's state of mind. First, what level of knowledge -- knowledge itself or some form of notice -- vitiates a claim of "good faith"? Second, need the knowledge be actual or merely constructive? Third, what duty of inquiry does notice impose?

The first set of questions begs the second: Knowledge of what? Of the transferor's insolvency, fraudulence, or both? If insolvency, then of what degree -- actual, imminent, or potential? If fraudulence, then regarding what transactions -- the enterprise involving the transferee or any of the transferor's dealings?

Regarding the second set of questions -- the debtor corporations' insolvency and fraudulence -- there is no reason

to disagree with the bankruptcy court. The debtor corporations were insolvent ab initio. They also made fraudulent representations to investors, though not necessarily at the outset. Moreover, Recile's fraudulence pertained to the JSM land deal itself, not to some unrelated transaction. Without an option on JSM's land, Recile could not have perpetrated his fraud upon his investors. The transferor was engaged in a crooked scheme.

The heart of the bankruptcy court's conclusion lies, then, in the first set of questions -- the transferee's state of mind. Once again, the bankruptcy court's findings are comprehensive, cogent, and entitled to the respect due them under the clear error standard. We point here only to the most telling out of a voluminous list of findings. With regard to JSM's knowledge of the debtor corporations' insolvency, the bankruptcy court found that "at the time the transfers occurred, JSM had no way of knowing that the debtors were insolvent." With regard to JSM's knowledge of the debtor corporations' fraudulent activities, Judge Brown found that JSM had read newspaper accounts of the SEC's suit against Recile. Finally, with regard to JSM's duty of inquiry, Judge Brown found that JSM, upon reading -- and being duly alarmed by -- these newspaper stories, undertook its own investigation, contacting the SEC and the federal district court, eventually receiving assurances from the district court that JSM could continue to receive option payments from Recile's corporations.

Based on its findings, the bankruptcy court's resultant legal conclusion is unproblematic. As noted above, there is little agreement among courts regarding the appropriate legal standard for this defense, because "the unpredictable

circumstances in which the courts may find its presence or absence render any definition of "good faith" inadequate, if not unwise." 5 COLLIER ON BANKRUPTCY P548.07[2][a]. Compare *In re Little Creek Dev. Co.*, 779 F.2d 1068 (5th Cir. 1986) (interpreting good faith in context of Chapter 11's availability). This court has lacked either occasion or disposition to attempt to formulate such a definition for purposes of § 548(c). Moreover, the atypical posture of the fraudulent conveyance claim here, i.e., the debtor's payments to an unaffiliated third party in an arms-length transaction, counsels caution in attempting to propound a broad rule concerning "good faith" for § 548(c). It is enough for present purposes to rely on the bankruptcy court's conscientious findings and conclusion.

B. Value

This court has not yet had occasion to articulate the standard for appellate review of trial court determinations of "value" under § 548(c). As the parties to this case do not dispute this point, we adopt for present purposes this court's approach to the review of trial court determinations of "reasonably equivalent value" under § 548(a)(2). *See In re Wes Dor, Inc.*, 996 F.2d 237, 242 (10th Cir. 1993). The question of valuation under § 548(a) is "largely a question of fact, as to which considerable latitude must be allowed to the trier of the facts." *In re Dunham*, 110 F.3d 286, 290 (5th Cir. 1997) (internal quotations omitted). That being said, "we review de novo the methodology employed by the bankruptcy court in assigning values to the property transferred and the consideration received." 110 F.3d at 290 n.11.

Section 548(c) allows a transferee who "takes for value" to retain this transfer to the extent that he "gave value to the debtor in exchange." It is undisputed that JSM "[took] for value"; Hays contends, however, that JSM "gave" no "value" in return. The bankruptcy court disagreed with Hays but the district court did not. Because the bankruptcy court's findings of fact are supported by the record and its conclusions of law are consistent with the text of the Bankruptcy Code, the Code's interpretation by this and other courts, and sound commercial practice, we reverse the district court's reversal.

This court is presented with two questions, one of law, the other of fact. Of Law: Did the bankruptcy court correctly conclude that the transferee's sale of short-term call options to a party unable to exercise them have "value" under § 548(c)? Of Fact: Did the bankruptcy court correctly conclude that this was an equitable exchange? We answer both in the affirmative.

The arc of § 548 easily encompasses as "value" the present exchange of cash for a right to buy or sell property at a future point in time. Courts are understandably chary of interpreting § 548 to regard promises of future support as "valuable." Without consideration, courts suspect gratuitous transfer rather than contractual exchange. See 5 COLLIER ON BANKRUPTCY P548.05[1][b]. This court is not, however, willing to regard as without "value" all transactions in which present cash is exchanged for a right of future exercise. *See In re Fairchild Aircraft Corp.*, 6 F.3d 1119 (5th Cir. 1993). To do otherwise would require rejection of our case law as well as the economic realities of options markets.

Hays, nonetheless, requests something of the sort. Hays has argued that these options had no "value" because there was no possibility that Recile would ever exercise them. To determine whether the debtor received "value," the district court held that courts

> must consider the circumstances that existed at the time and determine if "there was any chance that the investment would generate a positive return." If there was no such chance at the time of the transfers that the payments would generate a positive return, then no value was conferred.

District Court Opinion at 12 (quoting *In re R.M.L., Inc.*, 92 F.3d 139, 152 (3d Cir. 1996)). Hays asserts that, because of the fraudulent character of Recile's project, there was no chance that he would ever exercise this option. This option, therefore, had no "value."

Hays's legal argument is flawed for three reasons.

First, it contradicts the bankruptcy court's finding that Recile's development project began as a legitimate real estate venture, turning into a Ponzi scheme only in its subsequent stages. Second, its adoption would, by permitting the exercise of judgment in hindsight, conflict with basic economics and with Fifth Circuit case law. Like all speculative financial instruments, the value of an option can change over time, depending upon the value of the underlying property. This is their nature; options are bought and sold precisely to speculate on or hedge against market fluctuation. Without more, the fact that an option has become worthless in no way

proves that it was worthless at an earlier date. Thus, consistent with economic reality, this and other circuits unequivocally hold that for purposes of § 548 the value of an investment, even a risky one, such as we have before us now, is to be determined at the time of purchase. *See Fairchild*, 6 F.3d 1126-27; *In re Chomakos*, 69 F.3d 769, 770 (6th Cir. 1995); *see also* 5 COLLIER ON BANKRUPTCY P548.02[2].

Third, and critically, Hays's position would subvert the defensive character of § 548(c), a clause specifically designed to protect transferees, not transferors. 5 COLLIER ON BANKRUPTCY P548.07. We fully appreciate the problem that appears to trouble the district court: Under the guise of a negotiated contract, a debtor anticipating bankruptcy can transfer valuable properties for consideration of lesser worth. The problem is even more acute in the case at bar, where the consideration is alleged to be wholly without value.

Although we share this concern, § 548(c) is not the test that Congress has established to extirpate this form of fraud. The Bankruptcy Code looks, rather, to the "reasonable equivalency" test found at § 548(a)(1)(B)(i). In order to establish a *prima facie* case for avoiding a transfer as constructively fraudulent, the trustee must demonstrate that the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." *Id.* This provision ensures that there is no great disparity between the value of the goods exchanged. But it does so, most importantly, from the perspective of the transferor: Did the transferor "receive[]" enough? *See Fairchild*, 6 F.3d at 1127

("the recognized test is whether the investment conferred an economic benefit on the debtor").

Compare this with the provision at § 548(c). Instead of inquiring into the possibility and extent of the debtor's loss, it provides a means by which the unwitting trading partner can protect himself. Received property can be retained "to the extent" that the "transferee . . . gave value to the debtor." The provision looks at value from the perspective of the transferee: How much did the transferee "give"? The concern here, quite properly, is for the transferee's side of the exchange, not the transferor's gain.

Read in combination, §§ 548(a) and (c) are perfectly complementary. The first section affords creditors a remedy for the debtor's fraudulence or, as the case might be, mere improvidence; the second protects the transferee from his unfortunate selection of business partners. *See Fairchild*, 6 F.3d at 1126-27 (rejecting the proposition that "anyone who provides, deals with, or invests in an entity in financial straits would be doing so at his or her peril under § 548"). Each party can make a claim for cure, but only to the extent it was harmed. On account of the allegedly thoroughgoing fraudulent character of Recile's development project, Hays asks this court to reject JSM's § 548(c) defense. We decline to do so, however, because (1) call options do indeed have value, (2) their values are to be determined at the time of origination, and (3) a transferor's practical inability to exercise his option is irrelevant to its valuation under § 548(c).[2]

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[2] Hays also argues that these options -- at least those of a days or weeks term -- had no value on account of their exceedingly short duration. We find this argument without merit, both

The crucial fact question for our analysis is thus whether the bankruptcy court clearly erred in finding that JSM "gave value" under § 548(c). After a careful review of the evidence presented to the bankruptcy court, this court concludes that it did not so err.

On the basis of testimony offered by JSM's expert witness, Dr. Rodolfo Aguilar, the bankruptcy court found that JSM was "reasonably compensated" for the option it sold to Recile:

> The transfers to JSM were made for good and valuable consideration -- in exchange for the transfers, the debtors received the option to buy the property, a very valuable asset. JSM owned valuable commercial property and wished to sell it to the debtors. The debtors were attempting to construct a shopping mall complex and desired to purchase the property. The debtors paid JSM reasonable compensation for the options and rights to

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theoretically and practically. Although an option of a day's duration seems unusually short in light of the relatively greater time required to execute a real estate sale, a short life does not ipso facto negate the value of a financial instrument. More convincing to this court is the practical context from which this unusual practice emerged. The bankruptcy court found that daily payments emerged not from JSM's desire to create day-to-day option contracts but, rather, from Recile's lack of adequate financing. Instead of turning away this prospective purchaser, JSM'S indulged Recile's request for daily payments. This court respectfully rejects Hays insistence that no good deed go unpunished.

> property which resulted in the property being "tied up" for over two years.

Bankruptcy Court Opinion at 46-47; see also *id.* at 50 & 59.

Hays argues that the court erred in accepting conclusions based upon a flawed methodology, to wit, taking the sales price as recorded in the option contracts and the moneys received by JSM, determining the rate of return, and comparing this rate with those yielded by financial instruments of similar qualities. On the basis of the contract price of $11,250,000 and totaled receipts of $2,435,000, Dr. Aguilar concluded that JSM's rate of return was 8.64%, a rate which, he testified, was below that which could have been garnered by other similar investments. If anybody was disadvantaged in its deal, it was JSM, not Recile.

If this were the sum total of Dr. Aguilar's testimony, this court would be inclined to agree with Hays, for, as he correctly notes, the validity of Dr. Aguilar's conclusion rests upon the fairness of the underlying contract price. Absent a finding of the fairness of its value, it is impossible to determine the fairness of the option payments. The record demonstrates, however, that the bankruptcy court fully understood the methodological problem that Hays presents and that it obtained satisfactory evidence to assuage any concerns.

After hearing Dr. Aguilar's opinion that the rate of return was indeed inferior to similar investment vehicles, Judge Brown pointedly articulated the missing element of Dr. Aguilar's calculation, and encouraged the attorneys to produce evidence regarding the fairness of the contract price.

Dr. Aguilar thereupon testified that he believed that the contract prices set forth in the purchase agreements were reasonable, and presented extensive details upon which he based his conclusion, including, but not limited to, JSM's subsequent sale of an option to another developer.

Hays produced no expert testimony, either to prove that Recile "received less than a reasonably equivalent value" under § 548(a) or rebut JSM's claim that it "gave value" under § 548(c).

Absent contrary evidence regarding the valuation of JSM's property, the bankruptcy court was justified in finding that JSM did not part with a right worth less than what Recile had paid for it.

II. JSM satisfied the "regular course of . . . business" defense under LA. CIV. CODE art. 2040 (West 2001) to a revocatory action under art. 2036.

In a manner similar, but not identical, to § 548 of the federal Bankruptcy Code, the Louisiana Civil Code provides trustees with a tool for avoiding fraudulent conveyances from debtors. To avoid such a transfer, the trustee must demonstrate (1) that the transfer was "made or effected after the right of the obligee [trustee] arose" and (2) that the transfer "causes or increases the obligor's [debtor's] insolvency." LA. CIV. CODE art. 2036 (West 2001). The Code also provides trading partners with an absolute defense: "An obligee [trustee] may not annul a contract made by the obligor [debtor] in the regular course of his business." *Id.*, art. 2040 (West 2001).

The bankruptcy court concluded that Hays had satisfied the second prong of art. 2036 but said nothing regarding the first. It also concluded that JSM satisfied the "ordinary course of business" defense under art. 2040 and, accordingly, rejected Hays's claim. The district court affirmed the bankruptcy court's holding regarding the second prong of art. 2036 and concluded, further, that Hays had satisfied the first prong. Additionally, the district court held, on the basis of its own findings regarding Recile's fraudulence and JSM's bad faith, that it could not find that "Recile and the debtors were acting in the ordinary course of business."

Because this court upholds the bankruptcy court's finding that Recile's transfers to JSM were made "in the regular course of his business," we need not undertake an evaluation of Hays's art. 2036 claim. Furthermore, because this court rejects the district court's de novo finding of bad faith on the part of JSM, the only remaining question is whether Recile's fraudulence vis-a-vis his investors deprives JSM of his art. 2040 defense.

This court reads art. 2040 to encompass within the terms "regular course of his business" Recile's corporations' payments to JSM. The Louisiana Supreme Court has consistently let stand transactions between debtors and their trading partners, provided that the partners are not also creditors. In the most proximate case -- factually and chronologically -- the Louisiana Supreme Court held that "'[a] sale made to *one not a creditor* must be considered as one made in the ordinary course of business, if made for an adequate consideration *in cash*.'" *Hirsch v. Fudickar*, 9 So. 742, 744, 43 La. Ann. 886, 891, 1891 La. LEXIS 424, 6 (1891), reh'g denied and holding clarified to encompass credit

transactions, 9 So. 742, 744, 43 La. Ann. 886, 893, 1891 La. LEXIS 425, 4 (1891) (emphasis in original) (quoting *Pochelu v. Catonnet*, 4 So. 74, 76, 40 La. Ann. 327, 330 (1888)). Because Recile formed this contract in the role of real estate developer, because Recile received adequate consideration for his payments, and, finally, because JSM was not a creditor to any of Recile's many corporations, this court declines to find this transaction outside of the scope of art. 2040.

CONCLUSION

For the foregoing reasons, this court reverses the district court's 1999 reversal of the bankruptcy court's 1995 judgment and orders the entry of judgment in favor of JSM.

Judgment **REVERSED.**

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed March 29, 2001]

CIVIL ACTION NO. 00-32-B
CIVIL ACTION NO. 00-50-B

WILLIAM G. HAYS, JR., Receiver
And Disbursing Agent on Behalf Of the Debtors

v.

JIMMY SWAGGART MINISTRIES, et al.

AND

JIMMY SWAGGART MINISTRIES

v.

WILLIAM G. HAYS, JR., Receiver
And Disbursing Agent, on Behalf Of Debtors

RULING

This matter is again before the Court on appeals taken by the parties in this case. The facts of this case have been previously set forth by the Court in its earlier opinion.[1] On remand, Bankruptcy Judge Jerry Brown rendered an Amended Judgment[2] which determined the amount of transfers made to the defendants to be avoided and determined the amount of interest due the receiver. In response to the judgment, the receiver filed appeal number 00-32, seeking to overturn the bankruptcy court's denial of prejudgment interest. Jimmy Swaggart Ministries (JSM) also filed appeal number 00-50, appealing several issues for review. Russell and Power Malls also filed appeals numbered 00-51 and 00-59 respectively, although neither filed briefs within the applicable delays. The Court will not consider the Russell and Power Malls appeals.

I. FACTS

As noted earlier, the facts were aptly summarized by this Court in its Ruling dated February 9, 1999. Only a few facts will be set forth at this time to resolve the issues on appeal. Hays brought this action against JSM to recover funds paid to JSM by the debtors.[3] This court found as follows in its

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[1] District Court Ruling of February 4, 1999.

[2] Opinion on Remand for the District Court dated July 16, 1999.

[3] Sam J. Racile, the principal behind the development plan, formed and used various corporations in this scheme, and the corporations will be collectively referred to by this Court as the debtors.

earlier opinion: The debtors in this matter were improperly raising capital to fund a shopping mall development project in violation of state and federal securities laws. In order to develop the mall, the debtors needed to purchase certain land owned by JSM. In order to secure the property for purchase, the debtors, through various corporations, negotiated a series of options and agreements to purchase land owned by JSM. The debtors made numerous, substantial payments to JSM in order to "tie up" the property while the debtors tried to arrange financing. On several occasions, the parties were to execute acts of sale, but these meetings were either cancelled or did not take place. At times, the debtors made large daily payments, many in cash, which ranged from $7,500 to $25,000 to maintain an option to purchase. No sale was ever completed between the debtors and JSM. During these negotiations between JSM and the debtors and while some of the options were pending and daily cash payments were being paid to JSM, JSM actively sought other purchasers.

The debtors then filed for bankruptcy. The receiver sought to avoid the payments made to JSM by the debtors and bring the payments back into the bankruptcy estate. The bankruptcy court ultimately found in favor of JSM and against the receiver on all claims.[4] Hays appealed the ruling of the bankruptcy court which denied the receiver's claims under 11 U.S.C. §§ 548(a) (1), (a) (2), (c), and 544 (b). This Court reversed the decision of the bankruptcy court and remanded

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[4] Bankruptcy Court Memorandum Opinion of September 7, 1995, p. 30, ¶ 109; Bankruptcy Court Judgment of September 7, 1995.

the matter.[5] This Court also directed the bankruptcy court to add interest as determined by the bankruptcy court. [6]

On remand, the bankruptcy court found that the principal amount of the judgment against JSM was $2,472,500. The bankruptcy court also found that prejudgment interest was not appropriate. This matter is now before the Court on the receiver's appeal of the denial of prejudgment interest. Additionally, JSM appeals several issues, many of which were previously resolved by this Court on the first appeal.

II. STANDARD OF REVIEW

Generally, findings of fact made by the bankruptcy judge are reviewed under the clearly erroneous standard.[7] Factual determinations should only be overturned if, after a full review of the record, the Court is "left with a 'firm and definite conviction' that the bankruptcy court committed a mistake."[8] The legal conclusions of the bankruptcy court are reviewed under the less deferential de novo standard.[9] If, however, the bankruptcy court "premises a finding of fact

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[5] District Court Ruling of February 4, 1999.

[6] Minute Entry of March 26, 1999.

[7] In re Dunham, 110 F.3d 286, 289 (5th Cir. 1997); In re Bradley, 960 F.2d 502, 507 (5th Cir. 1992).

[8] *Bradley*, 960 F.2d at 507.

[9] *Bradley*, 960 F.2d at 507 (citations omitted).

upon an improper legal standard, the "finding of fact' loses the insulation of the clearly erroneous rule.'"[10] As the Fifth Circuit has stated, the clearly erroneous standard "is subject to modification if the bankruptcy court invokes improper methodology in reaching its conclusion."[11]

The standard of review for a trial court' s award of prejudgment interest is abuse of discretion.[12] "[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction", because "[a] district court by definition abuses its discretion when it makes an error of law".[13] Accordingly, "[t] he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions".[14]

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[10] *Id.* (citations omitted).

[11] *Dunham,* 110 F.3d at 289.

[12] *Carpenters Dist. Council v. Dillard Dep't Stores Inc.*, 15 F.3d 1275, 1288 (5th Cir. 1994).

[13] *In re Coastal Plains Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996)).

[14] *Id. See also Latvian Shipping Co. v. Baltic Shipping Co.*, 99 F.3d 690, 692 (5th Cir.1996) ("We will not find an abuse of discretion unless the district court's factual findings are clearly erroneous or incorrect legal standards were applied"); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 535 (5th Cir.1996) (court "abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

III. THE RECEIVER'S APPEAL REGARDING PREJUDGMENT INTEREST

The Fifth Circuit has allowed prejudgment interest in an avoidance action under § 548, concluding that as a matter of federal law, prejudgment interest can be awarded because the federal law creates the cause of action and the award of prejudgment interest furthers the policies underlying § 548 by compensating the estate for the time it was without use of the transferred funds.[15] An award of prejudgment interest pursuant to § 548 of the Bankruptcy Code is compensatory, not punitive.[16] It merely returns the defendants to their original economic position by requiring them to pay back in the form of interest what they earned or should have earned on the transferred funds.[17]

On remand, the bankruptcy court determined that an award of prejudgment interest was not appropriate.[18] The court based its decision on the following factors: (1) the amount of JSM's liability was not readily ascertainable; (2)

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[15] *Texas General Petroleum Corp. v. Leyh*, 52 F.3d 1330 (5th Cir. 1995).

[16] *See Investment Bankers, Inc. v. Davis, Gillenwater & Lynch*, 161 B.R. 507, 509 (D. Colo. 1992).

[17] *Texas General Petroleum Corp.*, 52 F. 3d at 1340; *Investment Bankers, Inc.*, 161 B.R. at 509 (D. Colo. 1992)(citing In re Chase & Sanborn Corp, 127 B.R. 903, 909 (Bankr. S.D. Fla. 1991).

[18] Bankruptcy Court's Opinion on Remand from the District Court dated July 16, 1999 at 11.

Hayes delayed in filing suit; and (3) JSM's liability was not readily apparent. Each of these will be discussed separately.

The bankruptcy cited *In re Armstrong*[19] for the proposition that prejudgment interest is not available where the amount for which the defendant could ultimately be liable was not readily ascertainable. However, in *Armstrong,* the defendants were not liable for the amounts transferred in the beginning of a series of transfers, but were liable only for the amounts transferred later in the same series. At issue in *Armstrong* was where within the series of transfers the line was to be drawn between those for which the defendant was not liable and those for which it was liable. In contrast, the Court found the defendants here are liable for all transfers. A certain sum of money was transferred, and as such, the amount of the receiver's claim was readily ascertainable.[20] *Armstrong* simply does not support the bankruptcy court's denial of prejudgment interest in the case at bar.[21]

The bankruptcy court also found that Hays had unnecessarily delayed bringing the instant avoidance action. However, even assuming this to be true, JSM suffered no

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[19] 217 B.R. 569 (Bankr. E.D. Ark. 1998).

[20] *See Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729 (1st Cir. 1982); *see also In re Investment Bankers, Inc. v. Davis, Gillenwater & Lynch*, 4 F.3d 1556 (10th Cir. 1993).

[21] Additionally, as the bankruptcy court noted, the *Armstrong* case also cited the defendant's lack of knowledge of the debtor's fraud while this Court found that JMS did have knowledge of the debtor's fraud.

prejudice from the delay since they retained the use and benefit of the funds during that time.[22] The bankruptcy court stated that the "relative equities may make prejudgment interest inappropriate when the plaintiff himself is responsible for the delay in recovery."[23] This Court believes that prejudgment interest should be awarded from the date of judicial demand. Since the receiver's demand was timely filed and because of the nature of the facts as found by this Court in its first opinion, the "relative equities" require that JSM pay the receiver interest on the money it received from the date of judicial demand. The case cited by the bankruptcy court in support of its decision to deny an award of interest merely denied interest prior to the filing of the demand.[24] As such, this case does not apply to an award of prejudgment interest from the date of judicial demand.

Finally, the bankruptcy court denied an award of interest because it had found that JSM *was not* liable while this Court found that JSM *was* liable. However, since this Court found that the bankruptcy court's earlier finding of no liability was an error of law, that finding should carry no weight in the determination of prejudgment interest. JSM

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[22] *See Investment Bankers, Inc.*, 161 B.R. at 509.

[23] Bankruptcy Court's Opinion on Remand from the District Court dated July 16, 1999 at 11.

[24] *See Redfield v. Barrels*, 139 U.S. 694, 11 S. Ct. 683, 35 L.Ed 310 (1981). The request made here was for pre-petition interest. This Court agrees that pre-petition interest should not be awarded under the facts of this case.

should not be allowed to benefit from this Court's reversal of the bankruptcy court's earlier legal errors.

The Court concludes that the bankruptcy court's denial of the receiver's request for prejudgment interest should be reversed. Specifically, this Court finds that the bankruptcy court erred as a matter of law in refusing to award interest. Because the bankruptcy court erred as a matter of law, its factual findings based on this erroneous application of law must also be set aside. As a result, the bankruptcy court's conclusion that prejudgment interest was not appropriate constitutes an abuse of discretion.

IV. JSM'S APPEAL

For essentially the reasons set forth by the bankruptcy court on remand, and for the reasons previously assigned by this Court in its first opinion, the Court finds JSM's alleged errors on this appeal are without merit or were previously ruled on by this Court.

V. CONCLUSION

For reasons set forth herein, the Court finds that prejudgment interest shall be awarded to the receiver from the date of judicial demand until entry of judgment on the sum of $2,472,500. The Court further finds that the applicable rate of prejudgment interest shall be determined under state law pursuant to LSA R.S. 13:4202, compounded on an annual basis. Post-judgment interest shall accrue on the aggregate of the principal amount plus prejudgment interest at the federal rate pursuant to 28 U.S.C. § 1961, compounded on an annual basis, from entry of judgment until paid.

The receiver shall prepare and file with the Court within 20 days a judgment in accordance with this opinion which shall be approved as to form only by the debtors.

IT IS SO ORDERED.

Baton Rouge, Louisiana, March 29, 2001.

/s/_____
FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed July 16, 1999]

IN RE

Hannover Corporation	92-11010-JAB
Redwood Raevine Corporation	92-11011-JAB
Rubicon XXI Corporation	92-11012-JAB
Place Vendome, Inc.	92-11013-JAB
Place Vendome Corporation Of America	92-11014-JAB
Penzance, Inc.	92-11015-JAB
ATG, Inc.	92-11016-JAB

Debtors

WILLIAM G. HAYS, JR., Receiver and Disbursing Agent, on Behalf of Debtors	ADVERSARY NO. 94-1076

Plaintiff

v.

Jimmy Swaggart Ministries, Bluebonnet Transfer Corporation, Power Malls of America, Ltd., Russkan, Inc., George B. Russell, Jimmie C. Thompson, and Fred C. Dent

Defendants

OPINION ON REMAND FROM THE DISTRICT COURT

Before the court is the motion of plaintiff, William G. Hays, Jr., Receiver and Disbursing Agent, for entry of final judgment.[1] The motion requests the court to enter a final judgment in this case based upon the recent ruling, judgment, and amended judgments rendered by the District Court for the Middle District of Louisiana. The judgments require this court to determine the amount of damages sustained by the debtor, and the amount of interest to be awarded. Jimmy Swaggart Ministries, Inc. has filed its response to the motion, and both parties have flied supplemental memoranda. The court is ready to rule on the motion without the necessity of oral argument.

I. Procedural background

On September 7, 1995, the court entered a memorandum opinion and judgment against Hays and in favor of the defendants dismissing the claims against the defendants. Hays appealed the decision to the District Court for the Middle District of Louisiana. On February 4, 1999, the district court ruled that this court erred as a matter of law in dismissing Hays claims under 11 U.S.C. § 548(a)(1), 548(a)(2), and 544(b), and reversed and remanded for further proceedings in accordance with its decision.[2] On February 5, 1999, the district court rendered a judgment in connection

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[1] Pl. 251.

[2] *See* Pl. 247 - Ruling entered on February 4, 1999.

with the ruling, which judgment was entered on February 8, 1999.[3]

On February 9, 1999, the district court issued a "Supplemental Ruling" and "Amended Judgment" that involved JSM's co-defendants, James C. Thompson, Power Malls, Inc., George B. Russell, and Russkan Corp.[4] The amended judgment ordered that Hays is entitled to the return of $84,875.00 from Power Mails and Jimmy C. Thompson, and $43,000 from George B. Russell and Russkan Corp.

On February 12, 1999, Hays filed a motion in the district court to recall and reform the mandate or alternatively to alter and amend under Rule 59(e). The motion requested the district court to amend both judgments to include instructions to the bankruptcy court with regard to prejudgment interest.[5]

On February 19, 1999, JSM filed a motion for new trial, rehearing, or to amend in the district court.

By Minute Entry of March 26. 1999, entered on March 30, 1999, the district court granted Hays' motion to recall and reform the mandate. The Minute Entry states:

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[3] Pl. 248.

[4] Pl. 249 - Supplemental Ruling entered on February 10, 1999; and Pl. 250 - Amended Judgment entered on February 10, 1999.

[5] Pl. 256, Ex. G.

> IT IS ORDERED that William Hays. Jr.'s Motion to Reform the Mandate or Alternatively Under Rule 59(e) to Alter or Amend Judgment be GRANTED directing the bankruptcy court to add interest as determined by the bankruptcy court.[6]

The minute entry also denied various motions filed by the defendants.

During the period following the rulings by the district court, JSM filed two appeals to the Fifth Circuit. The first appeal was voluntarily dismissed by JSM when JSM recognized that its appeal was premature. The Fifth Circuit dismissed the second appeal on June 4, 1999, holding that the ruling of the District Court was not a final order, and that the Fifth Circuit therefore lacked jurisdiction.

On April 12, 1999, Hays filed the pending motion for entry of final judgment, which requests this court to enter a final judgment in his favor against JSM in the amount of $2,472,500, plus prejudgment interest at the prime rate in effect on the date of each payment, calculated from the date of each payment through the date of judgment and compounded annually, plus legal interest computed on the total from the date of entry of judgment until paid. Hays also seeks a judgment against Jimmy C. Thompson and Power Malls, *in solido*, in the amount of $84,875, plus pre and post-judgment interest, and a judgment against George B. Russell

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[6] Pl. 272.

and Russkan Corp., *in solido,* in the amount of $43,000 plus pre and post-judgment interest.

II. Analysis

A. The judgment against JSM

1. Principal amount

Hayes' motion requests that the court enter judgment in its favor against JSM in the principal amount of $2,472,500.

JSM argues that the amounts paid by the debtors to JSM that were made more than one year prior to the filing of the bankruptcy petition on September 21, 1992 should be excluded. Under this argument, $920,000 in payments would be excluded because they were made prior to September 21, 1991. JSM argues that the recovery of these payments Under 11 U.S.C. § 544 is barred by the one year prescriptive period of Louisiana Civil Code article 2021, because Hays, the court-appointed receiver for the debtors, had been aware of some of the payments more than one year prior to the date of bankruptcy. JSM also asserts that the September 27, 1991 payment of $250,000 should be excluded because it was not one of the so-called "daily payments" referred to by the district court in its ruling. JSM submits that the district court's ruling is only geared towards the payments made in 1992, which total $816,250.

The court disagrees with JSM's argument. In its ruling entered on February 4, 1999, the district court held that this court erred as a matter of law, and that Hayes proved his

claims under 11 U.S.C. §§ 548(a)(1) and (a)(2). Section 548(a)(1) involves fraudulent transfers, while Section 548(a)(2) involves exchanges for reasonably equivalent value. Both sections permit the avoidance of transfers made within one year of the filing of the bankruptcy petition. In discussing the claim under Section 548(a)(1), the district court held that Hays had proved that Recile had the requisite fraudulent intent, and stated "[t]his is particularly so under the facts of the case considering the amount and frequency of the daily payments and the manner in which the payments were made by the debtors and received by JSM".[7] The "daily payments" referred to occurred within the one year period prior to the bankruptcy. It appears therefore, that at this point of the ruling, the district court is not addressing the payments that are outside of the one year period. As to Section 548(a)(2), the district court determined that the debtors received "no value" in exchange for the payments.[8] Although it is true that Section 528(a)(2) involves the avoidability of transfers made within one year, the district court quite clearly stated that there was *no* value to the debtor from the transfers made to JSM. The court does not specifically limit its discussion to only the transfers that were made within the one year period.

In discussing JSM's defense of good faith under 11 U.S.C. § 548(c), the district court placed heavy emphasis on the fact that JSM had received daily payments.[9] Again, although the daily payments occurred within the one year

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[7] *Ruling*, at 7.

[8] *Ruling*, at 13.

[9] *Id.* at 15.

period, the district court made no distinction between the daily payments and the payments outside of the one year period, and held that this court erred in its finding that JSM was in good faith.

The district court held that Hays had proved his claim under 11 U.S.C. § 544(b), asserting a revocatory action under Louisiana Civil Code article 2036. The district court did not distinguish between payments made in the one year period compared to payments made outside of the one year period.

In summary, the district court did not make the distinctions that JSM contends should be made as to when the specific transfer occurred. The district court reversed this court's findings and conclusions, and remanded for further proceedings. This court is obliged to carry out the mandate in accordance with the ruling of the district court. Based upon the ruling in its entirety, the court concludes that all transfers made by the debtors to JSM must be avoided.

To determine the total amount of the transfers, Hays refers to Plaintiff Exhibit C-80 and JSM Exhibit 68. Hays contends that the total amount of the transfers made by the debtors to JSM, contained in Exhibit C-80, is 2,472,500.[10] Linda Westbrook, Executive Secretary for JSM, testified that JSM prepared this exhibit, and that it is a summary of the receipts prepared by the accounting department at JSM from its computer records of JSM's bank deposits.[11] At the trial, JSM contested the accuracy of the payment amounts shown on

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[10] *See* Pl. 252 at Ex. 6.

[11] Pl. 252 at Ex. 8 and Ex. 9.

Exhibit C-80 and offered its own summary JSM Exhibit 68. The total shown on JSM Exhibit 68 is $2,455,000, which is $17,500 less than the total on Exhibit C-80.

JSM further argues that JSM Exhibit 68 includes some payments made to JSM directly by investors/creditors, which payments should be excluded. JSM submits that the payments made by the investors/creditors of the Place Vendome project directly to JSM were never property of the debtors, and therefore are not subject to avoidance. JSM argues that JSM Exhibit 69, totaling $1,066,250, represents the amount of the transfers from the debtors to JSM.[12] This amount consists of the payments received by JSM directly from the debtors during the period of September 21, 1991 to July 2, 1992.

The court disagrees with JSM. As discussed above, the court interprets the ruling of the district court to avoid all of the transfers of the debtors, regardless of the time period when the transfers were made. In addition, the district court did not refer to or distinguish between the transfers made by investors/creditors of the debtors versus the transfers made by the debtors, and did not disturb this court's finding that the transfers were transfers of the debtors' interest in property.[13] The daily payments were instrumental in the district court's determination that the transfers were made with intent to

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[12] *See* Pl. 268 at Ex. II.

[13] In the memorandum opinion of September 7, 1995, this court held: "The court finds that all of the payments made to JSM, whether by the debtor corporations or the individual investors are property of the estate." Memorandum Opinion at 46.

hinder or defraud.[14] Implicit in the district court's decision was the determination that all money received by JSM belonged to the debtors, including those payments made directly by investors. Further, it is this court's recollection that payments made by the investors occurred mostly in connection with the daily payments. The court rejects JSM's argument that the payments made by investors must be excluded.

To determine the principal amount of the judgment against JSM, the court must decide whether to rely upon Exhibit C-80 (totaling $2,472,500), or JSM Exhibit 68 (totaling $2,455,000). In JSM's second response memorandum, it acknowledged that "Plaintiffs Exhibit C-80 lists all receipts by JSM from all sources during the period of July 10, 1990 through August 6, 1992."[15] Therefore, the court finds that the principal amount of the judgment against JSM is $2,472,500.

2. Interest

As previously stated, the district court entered the following order with respect to interest:

> IT IS ORDERED that William Hays, Jr.'s Motion to Reform the Mandate or Alternatively Under Rule 59(e) to Alter or Amend Judgment be GRANTED directing the

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[14] *Ruling*, at 7, 10.

[15] Pl. 275 at 2.

> bankruptcy court to add interest as determined by the bankruptcy court.[16]

Hays argues that this language requires the court to enter prejudgment interest. Hays requests prejudgment interest at the prime rate from the date of each of the transfers. JSM responds that the order does not require the court to award prejudgment interest, and that prejudgment interest is not warranted in this ease.

The court has not seen the underlying motion to reform the mandate referred to in the district court's order. The parties have provided the court with only a few pages of the transcript of the oral argument. Based upon the plain reading of the district court's language, however, the court finds that it is not compelled to award prejudgment interest. If the district court had intended to compel an award of prejudgment interest, it would not have used the language "as determined by the bankruptcy court." The order compels the court to award interest of some kind, which interest award may be post-judgment interest only. Stated another way, the mandate permits an award of prejudgment interest in the court's discretion.[17]

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[16] Pl. 272.

[17] *See e.g. In re Texas General Petroleum Corp.*, 52 F.3d 1330, 1339 (5th Cir. 1995)(discussing the two-step analysis to determine whether an award of prejudgment interest is within a court's discretion); *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831,833 (2nd Cir. 1992)(holding that discretionary awards of prejudgment interest are permissible under federal law in certain circumstances); *In re Armstrong*, 217 B.R. 569, 580 (Bankr.

As support for its contention that the court should award prejudgment interest at the prime rate, Hays cites the case of *Alberti v. Klevenhagen.*[18]

The court is not persuaded by the *Alberti* case because it involved an award of attorney fees to successful plaintiffs in a civil rights case brought under 42 U.S.C. § 1988. A civil rights case, which provides for attorney fees to the prevailing party, is not analogous to the present case.

More persuasively, Hays also cites the Fifth Circuit case of *In re Texas General Petroleum Corp.*, involving a fraudulent conveyance action under Section 548 of the Code.[19] With respect to prejudgment interest, the *Texas General* court stated:

> Federal law governs the allowance of prejudgment interest when a cause of action arises from a federal statute. The standard of review for a trial court's award of prejudgment interest is abuse of discretion.
>
> Federal courts apply a two-step analysis to determine whether an award of prejudgment interest is within a court's discretion:

E.D. Ark. 1998)(holding that whether prejudgment interest should be awarded is within the discretion of the trial court).

[18] 896 F.2d 927 (5th Cir. 1990), *vacated in part on other grounds,* 903 F.2d 352 (5th Cir.1990).

[19] 52 F.3d 1330 (5th Cir. 1995).

> (1) whether the federal act that creates the cause of action precludes such an award; and (2) whether such an award furthers the congressional policies of the federal act. The Bankruptcy Code and particularly § 548 are silent with regard to prejudgment interest. The stipulation also is silent with regard to interest. Furthermore, an award of prejudgment interest furthers the congressional policies of the Bankruptcy Code. Section 548 allows the estate to recover fraudulent transfers made within a year before the filing of the bankruptcy petition. The purpose of the Section is to make the estate whole. Prejudgment interest compensates the estate for the time it was without use of the transferred funds. We determine that the bankruptcy Court did not abuse its discretion by awarding prejudgment interest.[20]

Although *Texas General* found that the award of prejudgment interest was not an abuse of discretion, the case did not discuss what the prejudgment interest was, i.e., the prime rate or some other rate. Nor did the case discuss the date from when the prejudgment interest began to run, i.e., from the date of the transfers or from the date of the filing of the complaint. Thus, the *Texas General* case supports Hays' position to the extent that it affirms that prejudgment interest may be awarded in Section 548 cases. It does not support Hays' argument that he should be awarded prejudgment

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[20] *Id.* at 1339-40 [citations omitted].

interest at the prime rate from the date of each of the transfers.

The case of *In re Armstrong,*[21] relied upon by JSM and cited by the district court in its decision,[22] discusses the issues in greater detail. *Armstrong* denied prejudgment interest on the plaintiffs Section 548 claim because the amount for which the defendant could ultimately be liable was not readily ascertainable. The court stated:

> In the instant case, the amount for which the defendant could ultimately be liable was not readily ascertainable. In light of the defense of good faith and the continuing nature of the transactions, the defendant could not determine, without judicial intervention, its liability, if any. Neither the fact nor the amount of the judgment could be known until trial and findings of fact by the court. Thus, the trustee's claims under 548(a)(1) were neither liquidated nor readily ascertainable. The degree of speculation together with the existence of the good faith dispute with regard to the section 548(a)(1) action, the lack of knowledge on the part of the defendant of the debtor's actual fraud, and the purposes of the statute indicate that an award of prejudgment

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[21] 217 B.R. 569 (Bankr. E.D. Ark. 1998).

[22] *See* Ruling at 6, 7, 14.

> [interest] on the section 548(a)(1) recovery, under the facts of this case, are not merited.[23]

It is true that the district court in the case at bar rejected JSM's good faith defense under Section 548(c), and found that JSM had notice of the debtor's insolvency.[24] The district court also held that JSM had knowledge of the debtors' fraud.[25]

On the other hand, there was a delay by Hayes in filing the lawsuit. Hayes was appointed by District Judge Livaudais as special master in May 1991, and knew about the transfers being made to JSM and JSM's involvement with the debtors some time thereafter. Hayes obtained the list of transfers received by JSM concerning the options and purchase agreements on the property in August 1992. Even so, Hays did not file the instant adversary proceeding until February 18, 1994. The relative equities may make prejudgment interest inappropriate when the plaintiff himself is responsible for the delay in recovery.[26]

Further, JSM liability was not readily apparent. This court found that JSM was not liable, while the district court found JSM was liable. This court upheld JSM's good faith

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[23] 217 B.R. at 580 [citations omitted].

[24] Ruling at 14.

[25] *Id.*

[26] *Wickham Contracting Co. v. Local Union No. 3,* 955 F.2d at 834-35.

defense, while the district court denied it. In addition, the amount of liability (if liability were to be found) was not readily ascertainable because many of the transfers occurred beyond the one year period prior to the bankruptcy. Although the district court determined that the debtors received "no value" in exchange for the payments,[27] the district court also referred throughout its opinion to the "daily payments".[28] The daily payments occurred within the one year period and was only a portion of the total payments made by the debtors. The fact that the amount of the judgment was not readily ascertainable is obvious because the amount has only been determined in this opinion.

Considering all the factors, the court finds that prejudgment interest is not appropriate in this case.

Hayes is, of course, entitled to post-judgment interest at the legal rate in accordance with 28 U.S.C. § 1961.

A. The judgment against the remaining defendants

The amended judgment entered by the district court on February 10, 1999 provides that Hayes is entitled to the payment of $84,875 from Power Malls and Jimmy C. Thompson, and of $43,000 from George B. Russell and Russkan Corporation.[29] The supplemental ruling entered on February 10, 1999 in connection with the amended judgment

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[27] *supra*, at 5.

[28] *Ruling*, at 2, 7, 10, 15.

[29] Pl. 250.

does not give any indication or provide any guidance as to prejudgment interest.[30] The district court's original decision did not address these defendants at all. The court finds that prejudgment interest as to these defendants is not warranted.

Judgment will be entered in accordance with this opinion on remand from the district court.

New Orleans, Louisiana, July 16, 1999.

/s/_____
JERRY A. BROWN
BANKRUPTCY JUDGE

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[30] Pl. 249.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-2030-B-M2

[Filed February 4, 1999]

WILLIAM G. HAYS, JR., RECEIVER AND DISBURSING AGENT ON BEHALF OF THE DEBTORS	)
VERSUS	)
JIMMY SWAGGART MINISTRIES, ET AL	)

JUDGES:
FRANK J. POLOZOLA, CHIEF JUDGE, MIDDLE DISTRICT OF LOUISIANA.

OPINION

RULING

William G. Hays, Jr. ("Hays"), the trustee of the bankruptcy estate, appeals the ruling of the bankruptcy court which denied the receiver's claims under 11 U.S.C. §§ 548(a)(1), (a)(2), (c), and 544(b). For reasons

which follow, the decision of the Bankruptcy Judge is hereby reversed.

I. FACTS

Hays brought this action against Jimmy Swaggart Ministries ("JSM") to recover funds paid to JSM by the debtors.[1] The bankruptcy court's memorandum opinion of September 7, 1995 sets forth the facts of this proceeding in great detail. Briefly restated and summarized, the relevant facts are as follows. The debtors in this matter were improperly raising capital to fund a shopping mall development project in violation of state and federal securities laws. In order to develop the mall, the debtors needed to purchase certain land owned by "JSM". In order to secure the property for purchase, the debtors, through various corporations, negotiated a series of options and agreements to purchase land owned by JSM. The debtors made numerous, substantial payments to JSM in order to "tie up" the property while the debtors tried to arrange financing. On several occasions, the parties were to execute acts of sale, but these meetings were either cancelled or did not take place. At times, the debtors made large daily payments, many in cash, which ranged from $7,500 to $25,000 to maintain an option to purchase. No sale was ever completed between the debtors and JSM. During these negotiations between JSM and the debtors and while some of the options were pending and daily

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[1] Sam J. Racile, the principal behind the development plan, formed and used various corporations in this scheme, and the corporations will be collectively referred to by this Court as the debtors.

cash payments were being paid to JSM, JSM actively sought other purchasers.

The debtors then filed for bankruptcy. The receiver sought to avoid the payments made to JSM by the debtors and bring the payments back into the bankruptcy estate.

The bankruptcy court ultimately found in favor of JSM and against the receiver on all claims.[2]

II. STANDARD OF REVIEW

Generally, findings of fact made by the bankruptcy judge are reviewed under the clearly erroneous standard.[3] Factual determinations should only be overturned if, after a full review of the record, the Court is "left with a 'firm and definite conviction' that the bankruptcy court committed a mistake."[4] The legal conclusions of the bankruptcy court are reviewed under the less deferential de novo standard.[5] If, however, the bankruptcy court "premises a finding of fact upon an improper legal standard, the finding of fact 'loses the

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[2] Bankruptcy Court Memorandum Opinion of September 7, 1995, (hereinafter "Memorandum Opinion") p. 30, § 109; Bankruptcy Court Judgment of September 7, 1995.

[3] *In re Dunham*, 110 F.3d 286, 289 (5th Cir. 1997); *In re Bradley*, 960 F.2d 502, 507 (5th Cir. 1992).

[4] *Bradley*, 960 F.2d at 507.

[5] *Bradley*, 960 F.2d at 507. (citations omitted).

insulation of the clearly erroneous rule.'"[6] As the Fifth Circuit has stated, the clearly erroneous standard "is subject to modification if the bankruptcy court invokes improper methodology in reaching its conclusion."[7] The Court will discuss each of the claims at issue on this appeal.

III. ANALYSIS

A. The 11 U.S.C. § 548(a)(1) Claim

The receiver alleges that the estate has the right to recover the payments made to JSM under § 548(a)(1). Section 548(a)(1) provides that:

> The trustee may avoid any transfer of an interest of the debtor in property, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --
>
> (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date of that such transfer was made or such obligation was incurred, indebted; ...

To void a transfer and recover funds under § 548(a)(1), the receiver must show that the transfer: (1) is a transfer of the

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[6] *Bradley*, 960 F.2d at 507 (citations omitted).

[7] *Dunham*, 110 F.3d at 289.

debtor's interest in property; (2) occurred within one year of the filing; and, (3) was made with the actual intent to hinder, delay, or defraud.[8] The bankruptcy court found that the receiver proved the first two elements, but failed to prove the third element even though the bankruptcy court found as a matter of *fact* that Recile did act with the intent to hinder, delay, and defraud. The Court finds that as a matter of *law*, the receiver did prove that the payments were made with the intent to hinder, delay and defraud under the facts of this case.

Whether or not the transfers were made with the "actual intent to hinder, delay or defraud any entity to which the debtor was or became ... indebted" is a legal issue.

Hays argues that the bankruptcy court erred as a matter of law in its finding that Recile lacked the requisite intent to defraud when it made the payments to JSM. The receiver also contends that the bankruptcy court misapplied the law set forth in § 548(a)(1) to the facts found by the bankruptcy court and erroneously required that the transferee have the intent to defraud in accepting the payments. A review of the record reveals that the bankruptcy judge found as a matter of *fact* that "Recile acted with the intent to hinder, delay, and defraud investor/creditors of Hannover/Place Vendome in effecting transfers to JSM".[9] However, the

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[8] The bankruptcy court correctly set forth this standard; Memorandum Opinion, p. 44. *See Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254 (1st Cir. 1991).

[9] Receiver's Original Brief, rec. doc. no. 4, p. 15, citing Memorandum Opinion, p.30, § 109.

bankruptcy court then erroneously concluded that as a matter of *law* the receiver "failed to prove that the transfers to JSM were made with the intent to hinder, delay, or defraud."[10] In other words, the receiver contends that once the bankruptcy court found the requisite intent to defraud as a matter of fact, it was required, as a matter of law, to find the transfers voidable under § 548(a)(1). The Court agrees.

After reviewing the entire record and the applicable jurisprudence, this Court finds that the bankruptcy court did err as a matter of law in its analysis under § 548(a)(1). In its Findings of Fact, the bankruptcy court found that "Recile acted with the intent to hinder, delay, and defraud investor/creditors of Hannover/Place Vendome in effecting transfers to JSM."[11] However, when the bankruptcy court analyzed the receiver's claim under § 548(a)(1), it apparently required the receiver to prove its claim under a stringent badges of fraud test. The bankruptcy court held that there could be no § 548(a)(1) liability absent proof of a sufficient number of badges of fraud. The bankruptcy court further held that there can be no badges of fraud without proof of fraud by the transferee.[12] This Court disagrees with the bankruptcy court's application of the badges of fraud test.

Courts use the badges of fraud test because it is unlikely that a receiver will be able to present adequate direct

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[10] Receiver's Original Brief, Rec. Doc. No. 4, p. 15, citing Memorandum Opinion, p. 49.

[11] Memorandum Opinion, p. 30, § 109.

[12] Memorandum Opinion, p. 49 and p. 48.

evidence to establish the debtor's intent to defraud creditors.[13],[14] "Therefore, courts look for common indicia . . . which have frequently bespoken fraudulent intent in the past."[15] If a confluence of several badges of fraud is established, then the receiver is entitled to a presumption of fraudulent intent.[16] This presumption shifts the burden of proof to the transferee to prove some "legitimate supervening purpose" for the transfers.[17]

In this case, however, the bankruptcy court found as a matter of fact that Recile had the requisite intent to hinder, delay and defraud when he made the transfers. Therefore, the application of the badges of fraud test was unnecessary under the factual findings made by the bankruptcy court. This Court concludes that once the receiver has, as a matter of fact, proven to the bankruptcy court's satisfaction that Recile had the requisite intent, the receiver has proved the third element of § 548(a)(1). This is particularly so under the facts of the

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[13] *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *In re Armstrong*, 217 B.R. 569, 573 (Bkrtcy. E.D. Ark. 1998), *citing Brown v. Third National Bank (In re Sherman)*, 67 F.3d 1348, 1353 (8th Cir. 1995).

[14] Fraud or bad faith on the part of the recipient of the transferred interest is not an element of proof. *In re Armstrong*, 217 B.R. 569, 573 (Bkrtcy. E.D. Ark. 1998).

[15] *Id.*

[16] *Id.*

[17] *Kelly v. Armstrong*, 141 F.3d at 802, *citing In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994).

case considering the amount and frequency of the daily payments and the manner in which the payments were made by the debtors and received by JSM.

This Court does not reject the badges of fraud tests used by other courts and relied upon by the bankruptcy court. This Court simply does not believe that the five badges of fraud test the bankruptcy court employed is the only means of proving the intent requirement under § 548(a)(1). This is particularly so under the facts of this case because the bankruptcy court found as a matter of fact that the debtors had the requisite fraudulent intent when they made the transfers. Thus, the Court finds that as a matter of fact and law, that the receiver has proven the third element of § 548(a)(1) and is entitled to recover the funds paid to JSM under this provision.

Because the bankruptcy court failed to apply the correct legal standard to the facts, the Court may also review the factual findings in conjunction with this claim under a de novo standard of review. A full consideration of the record reveals that the facts in evidence fully support a factual finding made by the bankruptcy court that the debtor made the transfers to JSM with the intent to defraud investor/creditors. The primary evidence of this fraudulent conduct is the fact that the transfers were made in the context of a Ponzi scheme. While it is true that Recile needed the money to complete the project, it is also clear that Recile was intentionally defrauding investors to reach that end. Such conduct cannot be condoned by the Court. The receiver has proven its claim under § 548(a)(1).

B. The § 548(a)(2) Claim

The Court now turns to a consideration of the receiver's claims against JSM under § 548(a)(2). Under §548(a)(2), a transaction is avoidable if it is (1) a transfer of the debtor's interest in property; (2) made within one year of the filing of the bankruptcy petition; (3) an exchange for which the debtor received less than a reasonably equivalent value; and, (4) made while the debtor was insolvent.[18] The bankruptcy court concluded that the receiver proved all the elements except for the third. In effect, the bankruptcy court found that the receiver failed to show that the payments made were not reasonably equivalent to the rights received in return. Thus, the bankruptcy court concluded that money paid JSM was reasonably equivalent to the value the debtor received in keeping the property tied up for over two years.[19] The receiver appeals this finding.

The test for reasonably equivalent value "is whether the investment conferred an economic benefit on the debtor," and the benefit must be valued as of the time the investment was made.[20] The reasonably equivalent value determination is a question of fact to be reviewed under the clearly erroneous standard.[21] The clearly erroneous standard is, however,

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[18] *In re McConnell*, 934 F.2d 662, 664 (5th Cir. 1991).

[19] Memorandum Opinion, p. 51.

[20] *In re Fairchild*, 6 F.3d 1119, 1127 (5th Cir. 1993).

[21] *In re Dunham*, 110 F.3d 286, 289 (5th Cir. 1997).

subject to modification if the bankruptcy court fails to invoke the proper method of analysis.[22]

The appropriate method of review for reasonably equivalent value is set forth in *In re Fairchild Aircraft Corp.*[23] and *In re R.M.L., Inc.*[24] Under the standards set forth in these cases, the bankruptcy court must first find that the debtor received value as defined in the statute. The court must then consider whether or not the value realized sufficiently constituted reasonably equivalent value.[25]

The receiver contends that the bankruptcy court failed to follow this method of analysis when it reviewed the issue of reasonably equivalent value because: (1) it did not first determine value; and, (2) failed to determine value separately from its determination of reasonably equivalent value. The receiver argues that the investor/creditors received no value at all for the money the debtors paid to JSM. The receiver contends that at the time these payments were made, there was no chance that the debtors would receive any benefit for the daily payments because there was no chance the project would eventually succeed. JSM disputes this, and contends that the bankruptcy court properly found that as a matter of fact and law, the debtors received real rights reasonably equivalent in value to the payments made.

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[22] *Dunham*, 110 F.3d at 289.

[23] *Fairchild*, 6 F.3d at 1127.

[24] *In re R.M.L., Inc.*, 92 F.3d 139, 149-50.

[25] *Fairchild*, 6 F.3d at 1127; *R.M.L., Inc.* 92 F.3d at 150.

To properly resolve this issue, this Court must first determine the appropriate standard of review. To make this determination, the Court must decide if the bankruptcy court employed the proper method of analysis; a review of methodology is de novo.[26] Under the facts of this case, the Court finds that the bankruptcy court failed to use the appropriate methodology in analyzing reasonably equivalent value because the bankruptcy court failed to properly consider value before determining reasonable equivalent value. To determine value correctly, the bankruptcy court must look to see if the benefit received had any economic benefit to the investor/creditors. A review of the voluminous record reveals that the bankruptcy court did not consider whether the rights received had any value to these particular creditors and investors in light of the circumstances at the time the payments were made. Instead, the bankruptcy court found that the rights were, in and of themselves, valuable. However, the bankruptcy court failed to consider the fact that the rights were useless if there was no chance that the project would ever be financed. Since the bankruptcy court did not invoke the proper methodology, the bankruptcy court's factual findings are not insulated by the clearly erroneous rule.[27]

To determine reasonably equivalent value, the Court must first look to see if the debtor received value, in the form of an economic benefit, for the payments made. To do so, the Court must consider the circumstances that existed at the time and determine if "there was any chance that the investment

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[26] *Dunham*, 110 F.3d at 289, n. 11.

[27] *In re Bradley*, 960 F.2d 502, 507 (5th Cir. 1992)

would generate a positive return."[28] If there was no such chance at the time of the transfers that the payments would generate a positive return, then no value was conferred within the meaning of § 548(a)(2).

A thorough review of the record reveals that at the time the payments were made by the debtors to JSM, there was no chance that a sale would actually occur. The payments in cash or otherwise were made to JSM, but there was simply no way under the facts of this case that the debtors could put the financing together to make the sale happen. This is not to say that Recile did not believe that he could make the deal come together. Nor does this Court conclude that another group of investors could not have successfully developed the property. It is, however, clear from the facts of this case that this project had no chance of success and the rights received by the debtors conferred no benefits on the investor/creditors. Since no value was received in exchange for these payments, all four elements of § 548(a)(2) were met. Thus, this Court must conclude as a matter of fact and law that the transaction is avoidable.

Even if the Court were to find that the rights had any value, the facts clearly indicate that the rights were not reasonably equivalent in value to the payments received. The bankruptcy court concluded that the agreements successfully tied up the property for over two years. A de novo review of the facts[29] reveals that the property was not truly tied up

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[28] *R.M.L., Inc.*, 92 F.3d at 152.

[29] De novo review is appropriate here as the bankruptcy court misapplied the legal standard to the facts.

because JSM could easily get out of the agreement with little notice or other complications.

C. JSM'S Defense Under § 548(c)

Even though the bankruptcy court found the transactions were not voidable under § 548(a), it considered the "good faith" defense JSM would have made under 11 U.S.C. § 548(c) if the receiver had proven his claims. Since this Court has found the transactions voidable under § 548(a), it must review the bankruptcy court's conclusions on this defense.

Section 548(c) provides that an initial transferee who takes for value and in good faith may retain an interest transferred to the extent that the transferee gave value to the debtor in exchange for such transfer or obligation. The key determination here is whether JSM (1) was in good faith when it took the payments; and, (2) gave value in exchange for the payments. JSM has the burden of proving good faith and value under § 548(c).

The bankruptcy court found that JSM proved it was in good faith when it received the transfers from the debtors and also proved that it gave value. The trial court concluded that Recile was a very effective salesman who convinced JSM to tie up its property for two years.

Good faith is determined on a case-by-case basis using an objective standard of what the transferee knew or should

have known.[30] Specifically, the inquiry is whether the transferee had knowledge of the debtor's insolvency.[31] The Court will review these findings of fact under the clearly erroneous standard.

A review of the facts in this case reveals that JSM did indeed have notice of the debtor's insolvency. The facts of this case reveal that JSM had knowledge of the debtors fraud and JSM'S knowledge of the fraud can only lead this Court to conclude that JSM also knew that the debtor was insolvent. To reach any other conclusion would cause this Court to ignore the facts of this case. Thus, this Court concludes JSM was on notice of the debtors insolvency and was not in good faith at the time it received the payments.

Furthermore, the circumstances surrounding the transactions were highly suspicious, and were sufficient to put JSM on notice that the debtors were possibly involved in fraudulent activity or were possibly insolvent. JSM cannot be allowed to extend its hand while closing its eyes and mind to what was really happening at the time the payments were made and received. The record shows that Clyde Fuller, who was negotiating with Recile on behalf of JSM, knew of the SEC investigation and knew that it involved allegations of fraud. JSM never looked into the debtors' ability to actually pay for the property and the evidence reveals that JSM knew that it was unlikely the project would ever be funded. Fuller

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[30] *Meeks v. Greenville Casino Partners, L.P. (In re Armstrong)*, 217 B.R. 569, 575 (Bkrtcy. E.D. Ark. 1998). (citations ommited).

[31] *Id.*

admitted that he suspected wrongdoing when he stated that Recile "looked like he was guilty."[32] The daily payments made to JSM were in and of themselves suspicious because they were often in cash or were checks signed over from a third party. It is clear the debtors were not able to produce checks on their own accounts. Additionally, the numerous changes of corporations by the debtors should have indicated and put JSM on notice that there was a problem. The evidence further shows that as Fuller began to demand that JSM step away from the deal, he was shut out of the negotiations. The circumstances surrounding the Power Malls option were also highly suspicious. The evidence clearly shows that JSM did not accept the payments with a good faith belief that the project was legitimate. JSM may have honestly hoped that the deal would come to pass, but it must or should have known from the suspicious circumstances that it was dealing with a potentially fraudulent development scheme. Therefore, the Court finds the receiver has met its burden of proving the bankruptcy court clearly erred in its finding that JSM was in good faith.

This Court also finds that the bankruptcy court also erred in finding that JSM gave value. JSM's expert looked at the transaction as if it was a loan or other investment rather than a payment for rights to buy property. Also, the facts indicate that the bankruptcy court clearly erred in finding that the property was tied up. Because the option was day-to-day, JSM could legally cancel this option at its will.

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[32] Original Brief on Behalf of Appellant, rec. doc. no. 4, p. 33 (citing transcripts).

D. The § 544(b) Claim under Louisiana Law

Under § 544(b) the trustee is authorized to avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowed under ... this title." The receiver argued that transfers to JSM were voidable under the Louisiana revocatory action found in Louisiana Civil Code article 2036.

Article 2036 provides:

An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency.

The bankruptcy court found that a plaintiff in a revocatory action "must prove: (1) pre-existing and accrued indebtedness, (2) that causes or increases the insolvency of the debtor."[33] The bankruptcy court based its legal conclusion on Central Bank v. Simmons.[34] The bankruptcy court found that the transfers caused or increased the insolvency of the debtor and held that the receiver proved the second element of the test set forth above. The bankruptcy court failed to make a finding as to the first element of the above test. Thus, the bankruptcy court did not decide whether plaintiff established the revocatory claim.

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[33] Memorandum Opinion, p. 60.

[34] 595 So. 2d 363, 365.

A review of the bankruptcy court's opinion shows that the bankruptcy court failed to invoke the proper methodology in analyzing the revocatory issue; therefore, the Court will review this issue de novo.

To succeed in a revocatory action, a plaintiff must prove anteriority of the debt and insolvency of the debtor.[35] Thus, the receiver must prove that: (1) the debtors owed the investor/creditors before they made the transfers to JSM; and, (2) the transfers caused or increased the insolvency. The receiver met the burden of proving the anteriority of the debt, since it is clear that the debtors owed the debts to the investor/creditors before the transfers were made to JSM. The facts also support the bankruptcy court's finding that the transfers increased the insolvency of the debtors. Thus, the receiver has proven the necessary elements to revoke the transactions under Article 2036 and 11 U.S.C. § 544(b).

The Court now turns to JSM's defense which relies on Louisiana Civil Code article 2040. Article 2040 provides that "an obligee may not annul a contract made by the obligor in the regular course of his business." The bankruptcy court held that the transfers were made in the ordinary course of business and could not be annulled.

It is difficult for this Court to find that Recile was acting in the course and scope of his business when at the same time the bankruptcy court held that "Recile acted with the intent to hinder, delay, and defraud investor/creditors of

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[35] La. C.C. art. 2036, cmt. (f); *See Central Bank v. Simmons*, 595 So. 2d 363 (La. App. 2 Cir. 1992).

Hannover/Place Vendome in effecting transfers to JSM."[36] The Court has previously summarized the facts on the fraudulent conduct of Recile and the debtors. The Court has also set forth findings that JSM did not act in good faith, was aware or should have been aware that the debtors were acting in a fraudulent manner and knew the debtors were insolvent at the time of the payments. Such findings prevent this Court from also finding that Recile and the debtors were acting in the ordinary course of business and thus allow JSM to assert a defense to the Louisiana revocatory action.

E. Conclusion:

For reasons set forth above, the Court hereby reverses the decision of the bankruptcy court. This matter is remanded to the bankruptcy court for further proceedings in accordance with this opinion.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, this 4 day of February, 1999.

/s/ _____
Frank J. Polozola
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[36] Memorandum Opinion, p. 30, P 109.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

ADVERSARY NO. 94-1076

[Filed September 7, 1995]

IN THE MATTERS OF

Hannover Corporation	92-11010-JAB
Redwood Raevine Corporation	92-11011-JAB
Rubicon XXI Corporation	92-11012-JAB
Place Vendome, Inc.	92-11013-JAB
Place Vendome Corporation Of America	92-11014-JAB
Penzance, Inc.	92-11015-JAB
ATG, Inc.	92-11016-JAB

Debtors

WILLIAM G. HAYS, JR., Receiver and Disbursing Agent, on Behalf of Debtors
Plaintiff

v.

Jimmy Swaggart Ministries, Bluebonnet Transfer Corporation, Power Malls of America, Ltd., Russkan, Inc., George B. Russell, Jimmie C. Thompson, and Fred C. Dent
Defendants

MEMORANDUM OPINION

This adversary proceeding came on for trial on the complaint of William G. Hays Jr., Receiver ("Hays" or the "receiver") against Jimmy Swaggart Ministries ("JSM"), Bluebonnet Transfer Corporation ("Bluebonnet") , Power Malls of America, Ltd. ("Power Malls"), Russkan, Inc. ("Russkan"), George B. Russell ("Russell"), Jimmie C. Thompson ("Thompson") , and Fred C. Dent ("Dent") , as well as the counterclaim against Hays filed by JSM. The court has considered the evidence, exhibits, record, and memoranda, and makes the following determinations.[1]

I. Findings of Fact

A. Introduction to the Place Vendome Mall Project

1. This lawsuit involves the unsuccessful attempt of Sam J. Recile ("Recile") and the debtor corporations to develop the "Place Vendome Mall Shopping Center" (the "mall" or the "mall project"), in Baton Rouge, Louisiana.

2. The plans for the proposed mall project required approximately 374 acres of land located on the east side of Bluebonnet Boulevard in Baton Rouge, adjacent to Interstate 10. (See D. Ex. 18).

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[1] This memorandum opinion constitutes the court's findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052. The court has jurisdiction over the matter under 28 U.S.C. § 1334. The matter is a core proceeding under 28 U.S.C § 157 (b) (2) .

3. The most critical property, consisting of approximately 127.55 acres fronting on Bluebonnet Boulevard, belonged to JSM.

4. From the summer of 1990 through the end of July, 1992, the debtor corporations, who were managed and controlled by Recile, were attempting to obtain and maintain options/purchase agreements on JSM's property and to obtain financing for the mall project.

5. Recile's efforts to develop the mall project violated both state and federal securities laws. In addition, Recile made misrepresentations to investors in the mall project as well as to the United States District Court for the Eastern District of Louisiana.

6. To raise money to develop the mall project, Recile and others working on his behalf, in some but not all instances, issued "investment units" or "promissory notes" to the investors which promised double (or more) your money back payments as an inducement to the investors. The notes matured in a relatively short period of time, i.e., 30 to 60 days, at which time the investors would receive double their money. Usually the double-your-money payment was represented by issuance of another note to the investor rather than actual payment.

7. The mall project was an extremely high risk venture. The investors knew or should have known that their only hopes of realizing the promised high rate of return within a short period of time was entirely dependent upon raising financing for and the eventual success of the mall project.

8. Representations that the debtor corporations had/either purchased, optioned, or had contracts to purchase the necessary real estate for development of the mall were essential to Recile's solicitation of funds from investors.

9. At no time did JSM, or any of its representatives, officers, directors or agents, engage in or assist in the solicitation of the investors or make any representation to any of the investors regarding the mall project.

10. From July 10, 1990 through the end of July, 1992, the debtor corporations and JSM entered into a series of option/purchase agreements, and extensions thereof, by which the debtors paid funds to JSM in consideration of the options and extensions. (See D. Ex. 15).

11. The instant lawsuit involves a complaint by Hays, in his capacity as the receiver and disbursing agent for the debtors under the debtors' confirmed Chapter 11 plan of reorganization, to recover and avoid the payments made by the debtors in consideration of the options/purchase agreement and extensions.

B. The players

12. Recile, an experienced real estate developer, was the dominant and controlling force of the debtor corporations. In certain instances, his name is used interchangeably with the debtor corporations.

13. Clyde Fuller ("Fuller"), chairman of the financial board of JSM, had complete authority to act on behalf of JSM as to any agreements with the debtor corporations. Fuller is a resident of Chattanooga, Tennessee and has never maintained an office in Louisiana. During all applicable times he was fully engaged in the operation from Chattanooga of his extensive trucking businesses. Fuller received no compensation for serving as the chairman of the financial board of JSM, and had no pecuniary interest in any of the transactions or agreements concerning the business affairs of JSM.

14. Linda Westbrook ("Westbrook,') was employed by JSM as the executive assistant to Jimmy Swaggart. She worked closely with Fuller during his dealings with the debtor corporations.

15. Defendant, Russell, is experienced in buying and selling real estate in the Baton Rouge area.

16. Defendant, Russkan, Inc., is a corporation owned and controlled by Russell.

17. Defendant, Thompson, works as a real estate developer, consultant, and agent in the Baton Rouge area.

18. Defendant, Power Malls, was a corporation owned by Thompson and Russell as the majority shareholders.

19. Defendant, Dent, was the former Commissioner of Financial Institutions for the State of Louisiana from 1986 to 1991. Dent entered into a settlement

with the receiver prior to trial and was dismissed from the case.

C. Power Malls Option of July 7, 1989

20. Thompson testified that on July 7, 1989, Power Malls entered into an option agreement with JSM. The option agreement concerned the purchase by Power Malls of 40 acres of JSM property fronting onto Bluebonnet Boulevard. The price of the option was $25,000. The purchase price was $7,200,000 (approximately $181,250 per acre). The term of the option was six months.

21. Power Malls failed to exercise its option. The option and any extension thereof (See P. Ex. C-1) expired prior to July 1, 1990.

D. Debtors' July 10, 1990 option agreement with JSM

22. The first option agreement between JSM and one of the debtors, Hannover Corporation of America ("Hannover"), dated July 10, 1990, contained a purchase price of $11,250,000.00 for a 68 acre tract or approximately $165,441.18 per acre. (the "July 10, 1990 option"). (P. Ex. C-16). The term was for six months and called for Hannover to pay the initial option consideration of $100,000.00 within seven days of execution. Although negotiated by Leo Higginbotham ("Higginbotham")[2], the option was signed by

[2] Higginbotham was a former state court judge in Baton Rouge who was sued by the receiver in a separate proceeding.

V. R. Phillips ("Phillips")[3] as president of Hannover. Fuller approved the form and substance of the option contract and authorized Frances Swaggart to sign it on behalf of JSM.

23. Hannover failed to pay timely the initial option consideration of $100,000.00 within the seven days required by the option. It was not until August 3, 1990 that two cashier's checks in the amount of $50,000.00 each were delivered by Hannover to JSM. (P. Ex. C-80; D. Ex. 68).

24. The option agreement provided that it could be extended at the end of the 90-day initial period to a 180-day initial period by payment of $200,000.00. (P. Ex. C-16 at 4). Hannover made an additional payment of $200,000.00 on October 10, 1990 which extended the option for an additional 90-day period. (P. Ex. C-80; D. Ex. 68).

25. Fuller testified that he could not recall exactly when he met Recile for the first time, but thought it was sometime around the end of 1990.

E. The first amendment to option agreement

26. The parties executed the first amendment to the July 10, 1990 option on November 16, 1990 (the "November

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[3] Phillips was at that time Recile's girlfriend. She later testified as a witness in the government's prosecution of Recile that resulted in a jail sentence for Recile.

16, 1990 amendment"). (P. Ex. C-21). This amendment added two more parcels (totaling 59 acres), and increased the purchase price by $4,000,000 to $15,250,000 (approximately $120,000.00 per acre) . (P. Ex. C-21). The total acreage covered by both agreements was 127.55 acres. The amendment retained the term and closing dates contained in the July 10, 1990 option.

27. On January 9, 1991, Hannover recorded an "Unconditional Notice of Exercise of Option". (P. Ex. C-22). The notice stated that Hannover was tendering a cashier's check of $100,000.00 to JSM in accordance with the July 10, 1990 option. (Id.) The notice gave Hannover an additional 90 days from January 9, 1991 to close the sale. (Id.)

28. On February 22, 1991 the Louisiana Deputy Commissioner of Securities issued four separate cease and desist orders against Hannover, Recile, Al Eden, and. Ken Kleinke (the "named parties"). (P. Ex. A-l). The cease, and desist, orders were limited to restraining the named parties from the illegal sale of securities in violation of Louisiana security laws, and in particular, La.R.S. 51:701-724. The orders did not name JSM as a party. The orders were not served on or sent to JSM.

F. Power Malls option of March 13, 1991 (the backup option)

29. In the meantime, Thompson of Power Malls had substantial doubt about the ability of the Recile/Hannover group to perform, and negotiated a. "backup option" with Fuller in favor of Power Malls. The backup option, dated

March 13, 1991, only covered the original 68 acre tract and contained a purchase price of $11,300,000.00 ($166,176.47 per acre). (P. Ex. C-20). The consideration for the backup option was $50,000 cash to be placed in escrow. (Id.) The escrow consisted of an uncashed check being held by an attorney, Frederick Kroenke, which was acceptable to Fuller. (P. Ex. G-4).

30. The backup option was subordinate to Hannover's option, and spelled out the circumstances by which it would in effect become the first option affecting the property, as follows:

> The parties understand that there is at this time a contract in effect between [JSM] and [Hannover] and that this contract is a backup contract in the event that the projected closing of the property between [JSM] and [Hannover] does not take place on or before April 9, 1991. [JSM] will have the right to extend the [Hannover] contract for an additional period on payment of not less than Three Hundred Thousand and 00/100 ($300,000.00) Dollars. If [Hannover] elects to extend the contract for the additional period and fails to close on the property, the days granted to [Hannover] will also be added to the beginning of this contract between the parties. This contract will take full force and effect in the event that the above closing does not take place on or before April 9, 1991 or, if an extension is granted [sic].

(P. Ex. C-20 at 3-4).

G. The second amendment to option agreement

31. Recile had Place Vendome, Inc. ("Place Vendome") incorporated on April 1, 1991. (P. Ex. C-34). In an instrument entitled "Corporate Acquisition", dated April 4, 1991, Hannover transferred to Place Vendome all liabilities and assets relating to the mall project. (P. Ex. 34). The assets were described as consisting of the contracts to purchase the site of the proposed mall. (Id.) The incorporation documents of Place Vendome and the "Corporate Acquisition" were provided to Michael R. Schneider ("Schneider") a partner with the law firm. of Stone, Pigman, Walther, Wittmann & Hutchinson ("Stone, Pigman"), who represented JSM.

32. A second amendment to the July 10, 1990 option was signed on March 30, 1991. (P. Ex. C-23). It called for a sale to take place on or before April 8, 1991, or an extension fee of $600,000.00 to be paid in order to extend the closing until July 8, 1991.

33. The debtors paid JSM $400,000.00.

34. On March 30, 1991, the debtors and JSM entered into an "escrow agreement" with Stone, Pigman to act as escrow agent. (P. Ex. C-23). The escrow agreement concerned the anticipated execution and escrowing of an act of sale of the JSM properties (the three tracts of land) to the debtors dated April 8, 1991.

35. On April 8, 1991, JSM and Place Vendome executed an act of cash sale covering the three tracts of land for the purchase price of $15,250,000. (P. Ex. C-24). The act of sale was placed in escrow pending the payment of the purchase price as well as other conditions.

36. The debtors never paid the purchase price nor met the other requirements of the escrow agreement. Thus, the act of cash sale was never released from escrow, and was presumably destroyed by Schneider.

H. The SEC Lawsuit

37. On April 11, 1991, the Securities and Exchange Commission ("SEC") initiated proceedings against Recile, Phillips, Hannover, Place Vendome, Redwood Raevine Corporation, and others, in the United States District Court for the Eastern District of Louisiana, Civil Action No. 91-1422, alleging securities fraud (the "SEC lawsuit"). (P. Ex. A-2). On April 12, 1991, the Honorable Marcel Livaudais entered a temporary restraining order against the defendants. (P. Ex. A-3).

38. Judge Livaudais, by preliminary injunction entered on May 1, 1991, appointed Hays as special master to perform an accounting of sources and uses of investor funds, and required that Hays be given access to Hannover/Place Vendome records. (P. Ex. A-4, ¶¶ VIII-XI).

39. Recile, Phillips, and Hannover/Place Vendome through their agents, violated both the temporary restraining order and the preliminary injunction by continuing their

fraudulent money-raising activities through the sale of unregistered securities.

40. In June of 1991, the SEC filed a motion for the appointment of a temporary receiver to take control of all of the assets and the books and records of Hannover, Place Vendome, and related entities, and to prevent Recile and the debtors from further violations of the securities laws.

41. The hearing on the SEC's motion to appoint a receiver was originally scheduled before Judge Livaudais for late July or early August, 1991. The debtors, through their attorney, Don Beckner ("Beckner"), were successful in obtaining delays in the receivership hearing for roughly one year.

42. According to the testimony of Glenn M. Constantino and Henry D. H. Olinde, associates in Beckner's office, the first delay was obtained when Beckner sent a letter dated July 29, 1991 to Judge Livaudais, enclosing a so-called financing commitment issued by the Capital International Bank & Trust, which purported to be an international bank owned and operated by the Kiowa Indian Tribe of Oklahoma. This "commitment" was for a loan in the amount of $23.1 million. (P. Ex. C-44).

43. The July 29, 1991 letter from Beckner also referred to a $100 million loan commitment arrangement that Place Vendome hoped to conclude, if for any reason the Indian bank commitment fell through. (P. Ex. D-29). The reference to the $100 million commitment related to an alleged commitment by "Princess Latifa" an alleged Saudi Arabian princess, to acquire a $100 million letter of credit, which would then be used to borrow money to fund the

project. The letter to Judge Livaudais did not give any of the details of the Princess Latifa proposal, nor did the letter identify the Princess. (Id.).

44. In reliance upon Beckner's continued assurances that the money was practically at hand to fund the project and repay investors, Judge Livaudais granted delay after delay of the SEC's motion to appoint a receiver.

45. Recile's continuing securities fraud in breach of Judge Livaudais' prohibitions were concealed from Judge Livaudais, the SEC, and the special master.

I. The June 30, 1991 amendment

46. On June 30, 1991, JSM and Hannover entered into another amendment to the July 10, 1990 option (the "June 30, 1991 agreement"). (P. Ex. C-25). This amendment provided for the succession and transfer of rights from Hannover to Place Vendome. On July 6, 1991, the parties executed an addendum to this amendment that extended the closing to July 31, 1991 provided that Place Vendome made the following payments, which would be applied toward the purchase price:

a. $100,000 - July 08, 1991
b. $100,000 - July 15, 1991
c. $100,000 - July 22, 1991

(the "extension agreement of July 6, 1992) (P. Ex. C-25).

47. These payments were not made. JSM received only $50,000.00 on July 8, 1991, and $50,000 00 on July 15 1991. (D. Ex. 68).

J. The July 31, 1991 sale

48. On July 31, 1991, JSM and Place Vendome entered into an extension/escrow agreement on the anticipated closing because the debtors did not have the required $5 million to close the act of sale. (P. Ex. D-33). The escrow agreement provided that the parties would execute all of the appropriate closing documents which would be held by Schneider, JSM's attorney, in escrow pending the payment of the $5 million cash payment to JSM.

49. The July 31, 1991 agreement further provided that Schneider would hold the documents in trust until August 7, 1991, and if the cash payment were not made by that date, the original documents would be destroyed. (P. Ex. D-33).

50. The required payment was not made. Consequently, Schneider tore up the escrowed closing documents.

K. Royal Marque

51. On August 1, 1991, JSM entered into an agreement with Royal Marque Company, Ltd. ("Royal Marque"), another Recile-controlled entity (the "Royal Marque option"). (P. Ex. C-48). The agreement, entitled "Option and/or Agreement to Purchase", covers additional property owned by JSM. (Id.) The agreement was signed by

Fuller on behalf of JSM and Steven E. Recile, Recile's son, on behalf of Royal Marque. (Id.) The $50,000 consideration therefor was deposited by JSM on August 2, 1991. JSM's deposit slip shows "Sam Recile" to be the source of the deposit. (P. Ex. C-127-ah; *See also* D. Ex. 68).

L. The September 1991 extension

52. After the July 31, 1991 sale to Place Vendome did not close, Recile and Fuller had numerous discussions in August and September, 1991 concerning the closing of the sale and the payment of the balance of the $300,000.00 provided for in the extension agreement of July 6, 1991.

53. During this period from August to September, 1991, Recile continuously assured Fuller that the funding would be available "soon" and that Place Vendome would be able to close the sale. Recile also repeatedly assured Fuller that the debtor would pay the balance of the extension price.

54. At certain times during this period, Fuller became angry with Recile, wrote letters demanding the payment of the balance of the purchase price, and threatened to cancel the option. On August 23, 1991, Fuller wrote Recile a short letter advising him to "[f]orget the deal". (P. Ex. C-54). He also sent Recile a more formal notice of default on August 27, 1991. (P. Ex. C-40). Recile, however, was successful in reassuring Fuller that funding for the sale was imminent, and that the extension payment would be paid. For example, on September 4, 1991, Recile wrote Fuller a letter stating that "I am pleased to advise that we have now concluded our financing . . ." (P. Ex. C-55). On September

17, 1991, Fuller sent another default letter terminating the option. (P. Ex. D-42). Fuller and Recile resolved the situation, however, because Fuller agreed to extend the Place Vendome option for the payment of $300,000.00.

55. On September 27, 1991, the debtors tendered two check to JSM to extend the option. One check was from "Rae Phillips Agent" in the amount of $50,000.00, the other was a cashier's check for $250,000.00 from Place Vendome. (P. Ex. C-46). JSM collected only the $250,000.00 (D-Ex. 68). Westbrook testified that she did not know if the Rae Phillips Agent check was ever placed with a bank for collection, and that she did not know what happened to the check.

56. JSM and Piace Vendome executed a document entitled "extension of option and/or agreement to purchase and funding of previously executed credit sale of property" dated "September ___, 1991" (the "September ___, 1991 agreement"). (P. Ex. C-37). The document was presumably executed on September 27, 1991 or soon thereafter when JSM received the balance of the $300,000 owed. The September ___, 1991 agreement recited the history of the agreements with Hannover/Place Vendome, and extended the July 31, 1991 closing and the payment of the $5 million until November 15, 1991.

57. This agreement, as did all of the previous agreements, provided that if the sale were closed and the $5 million cash payment was made, then all previous payments made to JSM would be credited to the purchase price; if the

sale did not close all previous payments would be forfeited to JSM.

58. As a result of the above extensions and payments, and despite the threatened cancellations and defaultnotices of Fuller, the court finds that the option and amendments thereto between JSM and Hannover/Place Vendome remained in effect continuously from July 10, 1990 through November 15, 1991.

M. The Gorman Judgment

59. Marvin Gorman obtained a judgment against JSM in October, 1991. The parties stipulated to the facts concerning the chronology and history of the Gorman judgment. The parties' stipulations, contained in Joint Ex. 3, are adopted as findings of fact, and provide as follows:

Bankruptcy Court Middle District of Louisiana
Memorandum and Opinion 9/7/95

[JOINT EXHIBIT B FOLDOUT]

ANTHOLOGY OF "GORMAN JUDGMENT"

VOLUME V OF JSH EXHIBIT BOOK

First judgment signed on October 23, 1991 Exhibit 165

First judgment recorded on October 28, 1991 Exhibit 165

October 1, 1991

Motion to reconsider motion for a new trial and to amend judgment November 4, 1991 Exhibits 164 and 167

Amended judgment November 15, 1991 (never recorded) Exhibit 168

Ex proprio muto order granting new trial - November 21, 1991 Exhibit 169

Final judgment of December 6, 1991 Exhibit 174

Order granting Motion for Suspensive Appeal December 17, 1991 Exhibit 176

Suspensive Appeal Bond filed in Original 558 Bundle 10271, dated December 19, 1991; approved December 20, 1991; recorded December 20, 1991. Exhibit 177

Final Judgment of December 6, 1991 recorded on December 26, 1991

Act of Cancellation of Judgment recorded April 6, 1992 Exhibit 179

EXHIBIT Joint Ex 3

BEST AVAILABLE COPY

N. The November 15, 1991 agreement

60. Under the terms of the September ____, 1991 agreement, the closing of the sale and the payment of the $5 million was extended until November 15, 1991. Place Vendome did not pay the $5 million to JSM by November 15, 1991.

61. On November 14, 1991, Recile wrote JSM a letter assuring that the funds would be forthcoming. (P. Ex. C-49). The letter indicated that "[a]t this point, we have paid out an audited $27 million to get our project to its present advanced stage", and that the appropriate permits and approval had been obtained from the Army Corp of Engineers. (Id.).

62. The parties entered into another extension agreement on November 15, 1991 because Place Vendome did not have the required $5 million cash portion of the purchase price. (the "November 15, 1991 agreement"). (P. Ex. C-56) . The November 15, 1991 agreement contained a "Background" section which referred to: (1) the original July 10, 1990 option; (2) the previous purchase price of $15,250,000.00; (3) the Juiy 31 1991 act of credit sale and the $5 million payment; (4) the previous payment of $300,000.00 which extended the closing until November 15, 1991; and (5) the previous agreements providing that all sums paid to JSM would be credited to the purchase price if the sale closed, but would be forfeited if the sale did not close.

63. The November 15, 1991 agreement amended the prior agreements by dividing the total purchase price of

$15,250,000.00 among the three parcels of land which remained in the agreement (a 16 acre tract, a 23 acre tract, and a 68 acre tract), and extended the closing date for passing the act of sale until November 20, 1991. (P. Ex. C-56 at 3-4). The November 15, 1991 agreement also applied all payments previousiy paid to JSM by Hannover/Place Vendome to the purchase price.

64. The receiver has asserted that the Royal Marque option of August 1, 1991 was somehow incorporated into this agreement. This contention is based on an obvious mistake contained in the penultimate paragraph which states:

> All of the other terms and conditions contained in the original Option and/or Agreement to purchase dated August 1, 1991, that are not in conflict with the amended provisions set forth hereinabove, shall remain in full force and effect. [emphasis added] .

(P. Ex. C-56 at 4).

65. This "August 1, 1991" date is an obvious mistake and should have been July 10, 1990, the date of the original agreement. This is so because (a) Royal Marque is not a party to and is not mentioned in the agreement; (b) the property described in the agreement is the same as that of the July 10, 1990 option and the November 16, 1990 amendment between JSM and Hannover/Place Vendome; and (c) the property described in the agreement is not the same as that described in the Royal Marque option.

66. The November 15, 1991 agreement stipulated that the closing would be held on or before November 20, 1991. The debtors failed to tender the $5 million payment to JSM on November 20, 1991. No closing was ever scheduled by the parties, and the debtors never requested or demanded that JSM tender title to the property, nor did they place JSM in default of the November 15,1991 agreement.

67. After the debtors breached the option/purchase agreements provided for in the original July 10, 1990 agreement, which was extended and modified through November 20, 1991, JSM terminated and cancelled the option with Hannover/Place Vendome.

68. On November 20, 1991 there were several recorded judgments and liens against JSM' s property, including: (1) a collateral mortgage of March 11, 1988 by JSM in favor of any future holder in the amount of $6,500,000.00 (P. Ex. C-116); (2) a sales and/or use tax assessment and lien in favor of the City of Baton Rouge in the amount of $1,190,978.81 (p. Ex C-118); and (3) a Civil District Court judgment dated October 23, 1991 and recorded the following day in favor of David Adler, trustee in the bankruptcy of Marvin and Virginia Gorman, in the amount of $10,000,000. (P. Ex. C-119).

O. <u>The Power Malls backup option continued</u>

69. In November, 1991, Russell asked Dent to introduce him to Recile. Russell and Dent discussed the status of the JSM property on Bluebonnet Boulevard, including

Power Malls' backup option. Russell and Dent also met with Thompson.

70. Through a series of meetings at the compound[4] concluding on November 20, 1991, Thompson, Russell, Dent, and Recile, sometimes with Constantino and Mike Uter, Recile's real estate attorney, attending, had negotiations concerning Place Vendome's acquisition of the Power Malls backup option.

71. On November 20, 1991, Power Malls assigned its backup option to Place Vendome Corporation of America ("PVCA") in a document entitled "Assignment of Claim". (P. Ex. C-58). The consideration stated in the assignment of claim was $350,000, of which $100,000 was to be paid immediately in cash, $50,000 was to be placed in escrow within 10 days, $100,000 was due on December 4, 1991, and $100,000 was due on December 20, 1991. (Id.)

72. The required $100,000 in cash was not paid on November 20. Instead, Place Vendome gave Power Malls $45,000 in cash. In addition, Dent testified that Recile gave him a check for $50,000 with instructions for disbursement to a number of people, including $1,405.00 to himself for a fee, $7,500 to John Bonfiglio, $4,000 to Russell, and $11,785.00 to Thompson.

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[4] The testimony showed that the debtor corporations owned real estate consisting of offices and a house on a 5.3 acre tract of land. Recile lived in the house, and the debtor corporations operated out of the offices. The witnesses referred to the property as the "compound", a term the court will also use in this opinion.

73. On November 21, 1991, Fuller contacted Power Malls through Thompson and advised that the Hannover/Place Vendome option had been terminated and that the Power Malls option was primary and in effect. (Testimony of Fuller and Thompson). Fuller testified that the Hannover/Place Vendome option was in effect prior to that time. Thus, the Power Malls backup option had not become primary, and the running of the 42 day "no risk period" (See infra at 21, Finding # 76) did not commence until November 21, 1992.

74. In accordance with the assignment of claim, Place Vendome remitted a cashier's check, in the amount of $50,000, dated December 4, 1991, to the order of "Power Malls of America & Jimmy Swaggart Ministries". (P. Ex. C-60). The funds were placed in escrow at Premier Bank in Baton Rouge. (Id.). The release of funds from this account required the joint signature and approval of Westbrook and Thompson. (Id.) The funds satisfied the deposit requirement under the backup option.

75. By letter of December 21, 1991, Thompson, on behalf of Power Malls, sent notice to Place Vendome and Recile that Power Malls was terminating the assignment of the Power Malls backup option in favor of Place Vendome because of Place Vendome's failure to pay all sums due Power Malls under the assignment agreement (P. Ex. C-61). Thompson sent a carbon copy of the letter to Fuller. (Id.)

76. Power Malls had 42 days from the time when Fuller advised that the backup option was "primary to cancel the option and obtain a refund of the $50,000.00 deposit.

Consequently, Thompson contacted JSM and cancelled the backup option within the 42 day "no risk period". On December 31, 1991, JSM refunded Power Malls the $50,000.00 deposit money from the account at the Premier Bank (P. Ex. C-62) . Thompson and Russell testified that Thompson received this money.

77. In summary, Place Vendome paid the following with respect to the Power Malls backup option:

a. cash	$45,000.00
b. paid to Dent for disbursement	$50,000.00
c. paid to Premier Bank - Power Malls / JSM account	$50,000.00
	$145,000.00

78. Of the total amount Power Malls received for its option, Thompson received the following:

a.	from cash	$23,000.00
b.	from Premier account	$50,000.00
c.	from Dent	$11,875.00
		$84,875.00

Russell received $43,000 from Place Vendome. The remainder was not accounted for at trial.

79. Russell and Thompson, the principals of Power Malls, were satisfied that the Hannover/Place Vendome option on the 68 acres was continuously in effect from July 10, 1990 to November 20, 1991. Power Malls never filed suit to enforce its backup option of March 13, 1991, never made demand upon JSM to exercise its backup option, and never

attempted to exercise the backup option. (Testimony of Thompson, Russell, Uter).

80. When Thompson and Russell received the money from Place Vendome, they believed that Place Vendome could close the deal.

P. Initial Bluebonnet Transfer Corporation Purchase Agreement

81. Beginning as early as November, 1991, Russell individually and through his corporation, Russkan, had engaged in discussions, with Recile in which Russell proposed that he could be of assistance to Recile and Place Vendome in raising and obtaining financing for the mall project.

82. On December 6, 1991, Place Vendome and Russkan entered into an agreement wherein Place Vendome agreed to pay Russell and Russkan a substantial fee if Russell was successful in helping Place Vendome obtain financing for the mall project. (P. Ex. C-97).

83. Russell then directed his attorney, Byford L. Beasley ("Beasley"), to propose that JSM sell the property to an undisclosed principal. In December of 1991, Beasley traveled to Chattanooga to negotiate with Fuller another purchase agreement from JSM. Neither Beasley nor Fuller could remember the date of their meeting. Beasley told Fuller he represented an undisclosed group desiring to purchase the JSM property that had previously been under contract to the Recile/Hannover/Place Vendome group. When Fuller asked Beasley if he represented Recile, Beasley told him "no", that

his client was from Great Britain. The parties tentatively agreed upon a purchlse price of approximately $15,000,000.

84. On December 27, 1991, Beasley wrote Fuller on the letterhead of Bluebonnet Transfer Corporation ("Bluebonnet"), enclosing a draft purchase agreement, suggesting a direct meeting between Fuller and Beasley's undisclosed principal in an effort to conclude the negotiations, and thanking Fuller for not previously requiring disclosure of Beasley's unnamed principal. (P. Ex. C-66).

85. The incorporation documents for Bluebonnet were not filed with the Louisiana Secretary of State until January 2, 1992. (P. EX. H-l). JSM neither requested nor received a financial statement or any other financial information concerning Bluebonnet's ability to pay the approximate purchase price of $15,000,000 for JSM's property.

86. On December 30, 1991, JSM and Bluebonnet executed an "Agreement to Purchase" (the "Bluebonnet agreement"). (P. Ex. C- 68). The agreement called for the purchase by Bluebonnet of six tracts of land for a total price of $15,950,000.00, with a cash down payment of $4,500,000 to be paid at closing, and the balance of $11,450,000.00, to be represented by the buyer's promissory notes. The total acreage was approximately 193 acres.[5] The purchase agreement further called for the payment of $100,000.00 by

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[5] Although the introductory paragraph recites that the total acreage is approximately 177 acres, the property descriptions attached add up to 193.01 acres.

the buyer within two days as a deposit to be applied to the purchase price upon the sale of the property. The closing was to occur on or before December 31, 1991.

87. Bluebonnet was a corporation whose stock was owned entirely by Russell. Beasley was the attorney for Bluebonnet, as well as its president and agent.

88. A letter agreement dated December 30, 1991 between Bluebonnet and Place Vendome evidences that Bluebonnet was to flip the property either to Hannover or PVCA contemporaneously with Bluebonnet's purchase of the property from JSM (the "Bluebonnet letter agreement"). (P. Ex. H-11). The Bluebonnet letter agreement was signed by Recile and Beasley, and attached the Bluebonnet agreement as an exhibit. There is no evidence that any representative of JSM was given a copy of the Bluebonnet letter agreement during this time period.

89. Recile caused both the Bluebonnet agreement and the Bluebonnet letter agreement to be filed in the public records of East Baton Rouge Parish on December 30, 1991. (P. Ex. C-68).

90. Beasley testified that he had not intended that the Bluebonnet letter agreement would be recorded. He became concerned that Fuller and JSM would find out what was now of public record. Beasley stated that he was embarrassed, but had no choice after the public filing of the letter agreement other than to tell Fuller that Recile would be the ultimate recipient of the property. Beasley testified that this "caused trouble" with Fuller because he had previously

told Fuller that Recile was not involved. Beasley testified that Fuller did not want to deal with Recile.

91. The $100,000 deposit called for by the Bluebonnet agreement was never paid to JSM. No closing occurred on December 31. Fuller complained about it to Beasley, and was told there were "too many people on vacation". Beasley told Fuller the money would be there on January 2, 1992.

92. Consequently, an extension agreement was entered into between JSM and Bluebonnet moving the closing date of the Bluebonnet agreement to January 2, 1992. (P. Ex. H-9). JSM received no consideration for the extension. This closing was then extended to January 3, 1992. On January 3, 1992, another "no money closing" was held, at which an act of credit sale from JSM to Bluebonnet was executed and placed in escrow with Schneider. (P. Ex. C-69). Simultaneously, as sale with assumption of mortgage was executed between Bluebonnet and PVCA. (P. Ex. C-70). These documents were escrowed, conditioned upon JSM's receipt of $4.5 million, and the cancellation and/or release of encumbrances on the property. The $4.5 million was not paid.

93. Schneider testified that at the January 3, 1992 closing he thought that Recile was involved with Bluebonnet because he had been dealing with the same individuals - Uter, and Recile. Schneider could not recall, however, whether Recile attended the January 3, 1992 closing.

94. Fuller testified at the trial, however, that he was not informed of the connection between Bluebonnet and PVCA.

95. Even if Fuller had been informed of the connection between Bluebonnet and PVCA, this is not evidence of bad faith or improper dealing by JSM. It is clear that Fuller had not been told of the connection prior to Recile's recordation of the agreements on December 30, 1991.

96. Bluebonnet never made the required payment of $4,500,000 and the documents were never released from escrow.

Q. Bluebonnet extension agreements - "per banking day" payments

97. Recile instructed Beasley to offer JSM $25,000.00 "per banking day" for an extension of the right to fund the payment called for in the escrowed credit sale signed on January 3, 1992. On January 7, 1992, JSM and Bluebonnet signed a letter agreement, providing for the extension of the closing date of the Bluebonnet purchase from JSM contained in the January 3, 1992 escrowed documents, upon the payment to JSM of $25,000.00 on January 7, 1992, an additional $25,000.00 on January 9 and $25,000.00 each banking day thereafter until funded. (P. Ex. C-75).

98. JSM received $25,000.00 on January 7, 1992 in the form of a cashier's check remitted by Hannover, but did not receive another payment until January 17, 1992 in the

amount of $25,000.00. (P. Ex. C-127 aj; D. Ex. 68 & 69). The second $25,000.00 payment under the letter agreement of extension was required to be paid on January 9, 1992. (p. Ex. C-75). It was not. (P. Ex. B-5). Beasley continued to assure Fuller that the loan would be funded at any time.

99. On January 17, 1992, JSM and Bluebonnet entered into another "agreement to extend purchase agreement". (P. Ex. C-76). This agreement extended the closing date to January 31, 1992 upon the immediate payment of a $25,000.00 extension fee. (Id.).

100. Thereafter, agreements were executed by Bluebonnet and JSM which called for the extension of the closing date of the escrowed credit sale between JSM and Bluebonnet, conditioned upon the daily payment by Bluebonnet of amounts as follows:

a. Agreement to extend purchase agreement dated January 24, 1992 - $7,500 per banking day until funded or until February 3, 1992 (P. Ex. C-77);

b. Agreement to extend purchase agreement dated February 3, 1992 - $7,500 per banking day until funded or until February 15, 1992 (P. Ex. C-78) ;

c. Agreement to extend purchase agreement dated February 3, 1992, with addendum dated February 15, 1992 - $7,500 per banking day until funded or until March 2, 1992 (P. Ex.

C-79);

d. Agreement to extend purchase agreement dated February 28, 1992 - $8,750.00 per banking day until funded from March 2 to March 9, 1992.(P. Ex. C-82);

e. Agreement to extend purchase agreement dated March 10,1992 - $26,500.00, and $8,750.00 per banking day until March 18, 1992 (P. Ex. C-83); and

f. Agreement to extend purchase agreement dated March 19, 1992 - $17,500 and $8,750 per banking day until funded or until March 30, 1992 (P. Ex. C-84).

101. The logistics of making the daily payments were that Beasley would physically deliver the money each day to Westbrook at JSM before 2:00 p.m. Westbrook would sign a receipt for the money. If Westbrook was unavailable, then someone else at JSM would receive the funds. Westbrook would then telephone Fuller to inform him whether the payment had been received. Some of the payments were made in cash. Some of the payments were late. In these situations, Beasley would leave a personal check with Westbrook with instructions to hold it pending receipt a day or two later of funds.

102. Most of the payments that were made under the extension agreements, beginning January 7, 1992, and continuing through March 26, 1992, when the arrangement

with Bluebonnet was terminated, were paid directly from Place Vendome or PVCA accounts. (P. Ex. H-12) . Although a few checks were paid from Bluebonnet accounts, the funds belonged to the debtor corporations. The records of JSM prepared by JSM in response to a subpoena from the Grand Jury of the Middle District of Louisiana with respect to the Recile criminal investigation on August 19, 1992, reflect that credit was given to Hannover or Place Vendome, not Bluebonnet (P. Ex. C-80).

103. Recile and PVCA concealed the daily payments being made to JSM from the SEC, the special master and Judge Livaudais.

104. The proposal to make the small payments for daily extensions was made by Beasley, the attorney and president of Bluebonnet, to Fuller, the representative of JSM. Beasley was under the belief that the funding was imminent, based upon the representations that were made to him by Recile, and continuously assured Fuller that the funding was imminent.

105. Fuller, based upon the continued assurances of Beasley, and ever hopeful that Bluebonnet would obtain the necessary loans or funding, agreed to the extensions of the closing deadlines.

106. Neither Beasley, Fuller, nor Russell anticipated that the daily payments would continue for an appreciable amount of time.

107. If JSM had demanded a large deposit of 10% or even 5%, neither Bluebonnet nor the debtors would have been able to comply, and the option would have terminated in January, 1992. This would have necessarily resulted in the termination of the Place Vendome mall project and the preclusion of any hope of the investors receiving a return of any of their investments. The JSM property was essential to the mall project and represented the most valuable tract because it was the only property which fronted on Bluebonnet Boulevard, a four lane highway, adjacent to Interstate 10. (D. Ex. 18).

108. Beginning March 11, 1992, upon receipt of $26,500.00, and continuation of the $8,750.00 payment "per banking day", JSM was to have received a non-refundable deposit of $1,000,000.00, on or before March 18, 1992, which if paid would have been credited against the purchase price of the escrowed credit sale dated January 3, 1992. (p. Ex. C-83). PVCA and Bluebonnet never paid this $1,000,000.00. This arrangement was continued by another extension agreement dated March 19, 1992, calling for the $1,000,000.00 deposit payment to be made on or before March 30, 1992. (P. Ex. C-84).

109. Recile and other brokers working for the debtor corporations used the existence of the escrowed credit sale, together with the extensions of the closing date, and the various financing "commitments" Recile was attempting to put together, an inducement to potential investors in the Place Vendome project, in an attempt to satisfy them that the project was real and that the property had been or would shortly be acquired. Recile was thus able to obtain additional funds from

investors in the Place Vendome mall project because of the escrowed credit sales extension arrangements, and financing "commitments". It is clear that Recile acted with the intent to hinder, delay, and defraud investor/creditors of Hannover/Place Vendome in effecting transfers to JSM.

110. There is no evidence that JSM knew about, participated in, or approved Recile's actions in holding out the escrowed credit sale as an actual sale.

R. Emile Weber

111. The receiver introduced into evidence two affidavits purportedly executed by Colonel Emile Weber ("Weber"), an attorney in Baton Rouge. (P. Ex. A-13-A and P. Ex. D-29.1). The affidavits were prepared by and on behalf of the debtors and notarized by the debtors' attorneys or employees of the debtors. Nobody at JSM ever authorized or directed Weber to execute the affidavits, and JSM did not even become aware of their existence until after this litigation commenced.

112. Louise Videau is an attorney for the SEC active in the SEC lawsuit. She testified that the Weber affidavits were used by Beckner in the SEC lawsuit in late July 1991 to support Beckner's argument that the SEC was attempting to hinder financing of the mall project. Videau testified that based on Beckner's assertions, when Schneider contacted her about a week later to see if the case had been settled (based on what Recile had said), she told him the case was not settled and that she could not tell him anything more.

113. Westbrook testified that Weber was a member of JSM's church, and a dear friend to JSM. He was very ill at the time, and has since died. She stated that Weber asked if he could use an office at JSM, so JSM let Weber use an office. In return, Weber performed minor legal work for JSM, and represented JSM in unrelated minor litigation.

114. Westbrook and Fuller testified that Weber did not represent JSM in any phase of its negotiations or dealings with Recile or the debtors. Weber did not draft any documents, did not confer with Fuller, Schneider, Uter, Beasley or Westbrook or any substantive matters, and was not copied on any correspondence. Beasley confirmed that Fuller told him not to discuss the matter with Weber. The court finds this testimony to be credible.

115. The evidence showed that Weber frequently ate lunch at the compound. While visiting the compound, Weber considered himself to be a "scout" for JSM. On a regular basis he reported Recile's activities to Westbrook and occasionally to Fuller. He frequently reported news of various financing commitments that Recile had purportedly obtained, and reported that everything was going well and that funding was forthcoming.

116. There is no evidence that Weber committed am.y acts of fraud or bad faith, or if he did, that it was on behalf of, or at the direction of or in the performance of his duties to JSM.

S. The General Health, Inc. contract

117. On March 23, 1992, JSM and General Health, Inc. ("General Health") entered into a contract to purchase and sell, the property previously optioned to Royal Marque for $4,000,000.00. (P. Ex. C-86) . The Royal Marque option had expired on February 1, 1992. This property, however, was part of the property subject to the December 30, 1992 purchase agreement between Bluebonnet and JSM. (P. Ex. C-85; D. Ex. 15).

118. The JSM-General Health contract to purchase and sell specifically acknowledged that it was a "backup option", and that the property was subject to a superior option in favor of Bluebonnet (P. Ex. 85 at 7 ¶ 22).

119. On March 27, 1992, JSM notified Bluebonnet that the December 30, 1992 option agreement was terminated because of Bluebonnet's failure to make the required extension payment. (P. Ex. C-85; D. Ex. 15).

120. On May 1, 1992, JSM and General Health perfected the sale of the 65 acre tract on the west side of Bluebonnet Boulevard (P. Ex. C-86).

121. Barbara Dixon ("Dixon") was a real estate agent for JSM. During February and March of 1991 she had tried to arrange a sale of the 68 acre tract to Thompson. She had an oral agreement with JSM that she would receive a large commission if she sold JSM's property, but she would not have received a commission if the sale to Recile had gone through. During February, March, and April, 1992, Dixon

had been in contact with other potential purchasers of the JSM property, in the event that Bluebonnet was unable to close the deal. (P. Ex. C-145; P. Ex. C-146, p. Ex. C-147). Fuller also encouraqed Thompson to try to find another buyer. Thompson met with JSM on several occasions during January and February, 1992, to discuss his marketing efforts. (P. Ex. C-137).

122. Dixon had never met or had any business dealings with Recile. At various times, Dixon relayed certain gossip to Westbrook about Recile. Westbrook did not believe what Dixon told her because it was hearsay and because Westbrook knew that Dixon was biased against Recile because she would not receive a commission if the sale to Recile went through.

T. The second purchase acreement with Bluebonnet

123. On April 2, 1992, JSM was approached by Bluebonnet to enter into a second purchase agreement.

124. Consequently, on April 2, 1992, JSM and Bluebonnet signed another agreement to purchase, covering all of the property covered in the January 3, 1992, escrowed credit sale, except for the 65 acre tract that was about to be sold to General Health (the "April 2, 1992 agreement"). (P. Ex. C-92). The total price to be paid by Bluebonnet under the April 2, 1992 agreement was $12,500,000.00. Of this amount, $2,400,000.00 was to be paid at closing, $5,050,000.00 was to be paid 180 days from closing, and the balance, $5,050,000.00 was to be paid within one year of

closing. (Id.). The previous payments made by Bluebonnet and the debtor corporations were considered, and deducted from the purchase price in determining the purchase price on the second Bluebonnet purchase agreement. The agreement provided that the sale was to close on or before April 7, 1992. (Id.).

125. Bluebonnet assigned its rights to the April 2, 1992 agreement to PVCA on April 6, 1992. (P. Ex. C-87).

126. At about this time Fuller and Recile resumed communications. Recile assured Fuller that the funding was in place and that PVCA would be able to meet the terms of the purchase agreement and close the sale. Fuller, although skeptical, was still hopeful that Recile would be able to obtain the financing.

127. The debtor corporations and the defendants in the SEC lawsuit were still allowed to continue operations. The agreement between the SEC and the defendants in the SEC lawsuit, approved by Judge Livaudais, provided that the defendants would obtain the necessary financing not only to complete the project, but to repay all of the investors. (D. Ex. 296, 311, 333, 366). The defendants were permitted to continue to attempt to obtain permanent financing.

128. To support his statements that funding was imminent, Recile forwarded to Schneider on April 3, 1992, a copy of a "commitment" to provide financing. (P. Ex. D-60). The commitment called for a non-refundable fee of $600,000, provided for very expensive financing, and included contingencies that would have been extremely difficult for

PVCA to comply with. Although the contingencies may have been difficult to fulfill, the commitment confirmed Recile's statements that funding was imminent.

129. On April 6, 1992, JSM and PVCA executed another credit sale and no-money closing to be held in escrow pending receipt of the cash portion of the purchase price of $2,400,000.00. (P. Ex. C-88) . In connection with the closing PVCA's promissory note in the principal amount of $10,100,000.00 was made payable to the order of JSM. Uter, Recile's real estate attorney, was the notary. Schneider was a witness, and received all of the documents in escrow.

130. Additionally, on April 6, 1992, PVCA, Hannover, Place Vendome, and Recile executed a "notice of assignment" officially informing JSM that PVCA had assumed Bluebonnet's rights ,under the agreement to purchase dated April 2, 1992. (P. Ex. C-89). The notice of assignment further provided that (a) all previous agreements between JSM, the debtor corporations, Recile, and other subsidiaries were superseded by the April 2, 1992 agreement; and (b) the debtor corporations, Recile, and all subsidiaries and affiliates "hereby release and discharge JSM from any and all liabilities, obligations, debts, damages, claims, actions and causes of action rising out of or in connection with or in any way related to a sale, pending sale or agreement to sell" the property, except those contained in the agreement to purchase of April 2, 1992. (Id.).

131. The consideration for the execution of the notice of assignment was the execution of the act of credit sale

to PVCA. The consideration received by the debtors for the release and discharge was more than reasonable and sufficient.

U. Extension of the second purchase agreement with Bluebonnet

132. On April 10, 1992, because PVCA was unable to pay the required $2.4 million at closing, JSM and PVCA entered into an "agreement to extend purchase agreement". (D. Ex. 65). The agreement provided that the closing was extended until April 17, 1992, and that PVCA was to pay a $20,000 extension fee and $10,000 per banking day until closing. (Id.). The agreement further stated that the daily payments were not to be credited against the initial payment at funding, and in the event of default, the payments were to be forfeited to JSM. (Id.).

133. PVCA paid the $20,000 extension fee.

134. The "per banking day" payments started anew, according to the same previous arrangement by which Beasley would deliver the payments. The first $10,000.00 cash payment from PVCA to JSM was deposited on April 27, 1992. (D. Ex. 68).

135. No further extension agreements were signed by the parties, but the "per banking day" payments of $10,000 continued, even after the April 17 deadline stipulated in the April 10, 1992 agreement.

136. Between April 10, 1992, and August 6, 1992, a total of $820,000.00 was paid to JSM by the $10,000.00

"per banking day" payments. (P. Ex. B-5). The deposit slips for JSM' s operating account, indicated that the source of the funds was Place Vendome. (See P. Ex. C-127bp - dp).

137. Beginning on June 12, 1992, PVCA made some of the payments to JSM by wire transfer. (P. Ex. C-99). The wire transfers to JSM were actually remitted by investors in the Recile/Place Vendome mall project. A list of payments prepared by Westbrook in August, 1992, reflects that the money was being paid from the account of Place Vendome (P. Ex. C-80). In addition, in some instances cashier's checks remitted by investors were tendered directly to JSM. For example, the cashier's check obtained by Christine Dossey was endorsed in blank, then endorsed by PVCA to the order of JSM, then delivered to JSM on July 7, 1992, and deposited the same day into the JSM operating account with the notation "Place Vendome" on the deposit slip. (P. Ex. C-127-df. See also P. Ex. C-127-dc; P. Ex. C-127-db).

138. The receiver's records of the debtors' "investment units" reflect that the investors who wired money into JSM's account, or whose checks were endorsed to JSM, were given credit for such investment, and were issued promissory notes of Place Vendome with respect thereto.

139. On some occasions JSM accepted cash as the $10,000 payment, and gave receipts to Place Vendome. (P. Ex. H-12 and H-13).

140. Although JSM.argued at the trial that the payments made by investors were not funds of the debtors, and were not "property of the bankruptcy estate", this

assertion is groundless because the payments were clearly made to JSM on behalf of the debtors. The receipts issued contemporaneously with the payments indicated "Place Vendome".

V. The receivership and bankruptcy

141. On July 29, 1992, Judge Livaudais signed the permanent injunction that placed the debtor corporations into receivership and enjoined Recile and all other agents, attorneys and employees of Place Vendome from interfering with the receiver's possession of the assets of the corporations. (P. Ex. A-11).[6]

142. Hays, the former special master and newly-appointed receiver, took possession and control of the compound and the books and records of the debtor corporations on July 30, 1992. He immediately terminated all employees, after being told by Recile that there was no money with which to pay them. Hays found only $6,000 cash at the offices, plus approximately $2,000 in the Place Vendome bank account.

143. Upon taking control of the compound, Hays saw for the first time the various investor lists and investor notes which had previously been concealed by Recile from Hays, the SEC, and the district court. Hays also saw for the

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[6] Judge Livaudais' order was affirmed in the case of S.E.C. v. Recile, 10 F.3d 1093 (5th Cir. 1993).

first time documents evidencing the daily payments to JSM which had also been concealed.

144. On July 30, 1992, Beasley requested that Hays pay the $10,000 daily payment due to JSM on that day. Hays informed him that to his knowledge the corporations had no money with which to make the payment.

145. A few days after taking over, Hays evicted Recile from the house at the compound.

146. The receiver decided that a bankruptcy filing would best protect the interests of all creditors because several individual creditors were attempting to obtaim preferential payment on their investment units. Therefore, on September 23, 1992, the receiver filed voluntary petitions under Chapter 11 of the Bankruptcy Code on behalf of the seven debtor entities. The pending adversary proceeding was filed by Hays as the receiver on February 18, 1994.

W. S'Avancer, Ltd.

147. At the end of July, 1992, Fuller was contacted by an attorney, James McCann ("McCann"), who indicated that he represented a corporation called S'Avancer, Ltd. ("S'Avancer"). Fuller was not familiar with McCann and had not had any previous dealings or discussions with him.

148. Fuller testified that McCann told him that S'Avancer was composed of former investors of the Place Vendome mall project who were interested in proceeding with

the project without Recile. McCann told Fuller that Recile was not involved with S'Avancer.

149. JSM and S'Avancer entered into an oral agreement concerning the options on the property that was later set forth in a written agreement executed between JSM and S'Avancer in August, 1992. (P. Ex. C-130). Fuller signed the agreement for JSM, and McCann signed the agreement for "S'Avancer, Ltd. (In formation)". (Id.). The date in August on which the agreement was signed was left blank. (Id.)

150. According to the testimony of Hays, on July 29, 1992, McCann withdrew from his trust account a total of $10,000.00 cash. The next day, July 30, 1992, $10,000.00 cash was delivered to JSM by Beasley. (P. Ex. C-80). Hays further testified that the source of the money in McCann's trust account had been investments in Place Vendome totalling over $180,000.00.

151. On July 31, 1992, Videau, the SEC attorney, faxed Schneider a copy of the order with the permanent injunction entered by Judge Livaudais in the SEC lawsuit. (P. Ex. D-75). Another copy of Judge Livaudais' order was faxed to Schneider on August 3, 1992 by the receiver's counsel. (P. Ex. D-72). JSM asserted the attorney-client privilege in response to questions of Schneider regarding communications its representatives may have had with Schneider during the course of the SEC lawsuit. Therefore, it is not known whether Schneider communicated to his client, JSM, that the permanent injunction had been issued.

152. JSM received payments from July 29, 1992 through August 6, 1992 in the total amount of $60,000.00. (Joint Ex. 4; D. Ex. 68; P. Ex. B-5). Of these payments, $10,00.00 was in cash, and $5,000 was a check from McCann. (Joint Ex. 4; D. Ex. 68). The remaining funds appear to have come from investors of the Place Vendome mall project. (Id.)

153. After the signing of the S'Avancer agreement, Fuller was contacted by Recile. Recile advised Fuller that he was an "agent" of S'Avancer. Fuller did not think that Recile had an interest in S'Avancer, but thought that Recile's son, Steve Recile, might have had an interest, although he never checked this out.

154. After Fuller suspected that Recile was involved with S'Avancer, he terminated the agreement with S'Avancer, and advised Recile that as of August 7, 1992, neither Hannover, the debtors, nor S'Avancer had any options on any of JSM's property. (P. Ex. C-130).

155. The court finds Fuller' s testimony to be credible. Based on the entirety of the evidence presented, the court finds that JSM terminated its agreement with S'Avancer after finding out that Recile was involved with S'Avancer and after learning of the permanent injunction. There was no evidence that JSM knew that McCann had taken money from his trust account for the payment or that JSM was in bad faith in accepting the payments made after July 31, 1992.

X. Testimony of Dr. Aguilar

156. Dr. Rodolfo Aguilar, an expert real estate financial analyst, testified on behalf of JSM. Dr. Aguilar is a highly qualified expert and his testimony was well supported.

157. Aguilar analyzed the rate of return received by JSM from the payments over the period that its property was tied up under the various options/purchase agreements from July 10, 1990 to August 6, 1992. The total amount of payments received during that time from all sources, including payments directly from investors, was $2,435,000. Aguilar determined that JSM received a return of 8.64% for having its property tied up during this period. This return was .01% below the return on Corporate Baa rated bonds for that period. (Pl. 75). Aguilar testified that JSM should have received a higher rate of return considering the risk involved in tying up the property for that period of time, and that JSM's return was marginally adequate.

158. Aguilar stated that the daily payments were unusual, and that JSM would have been justified in seeking a 5% or 10% down payment. If the debtors did not have sufficient funds for such a down payment, then it showed JSM's cooperation in keeping the deal alive in a situation in which everyone wanted the deal to go through.

159. Finally, Aguilar testified that in general, option payments for real estate should not be credited to the purchase price, and that if they are, the purchaser is being given a free ride. In his opinion, there was no question that JSM should

keep the money received from Hannover/Place Vendome/Bluebonnet because they did not buy the property.

160. The court finds Aguilar's testimony to be credible.

II. Conclusions of Law

A. Summary of receiver's claims

Hays seeks judgment against the defendants on a number of different theories and in a variety of amounts.

Hays seeks a judgment against JSM in the amount of $2,472,500, consisting of all of the amounts paid to JSM by the debtors for the various: options and extensions.[7] Hays proceeds against JSM under the following theories: (1) 11 U.S.C. § 548(a)(1) - actual intent to hinder, delay or defraud; (2) 11 U.S.C. § 548(a)(2) - constructive fraud - no value given; (3) 11 U.S.C. § 544(b) and 550(a), and the revocatory action contained in the Louisiana Civil Code arts. 2036-2043; and (4) miscellaneous other state law theories.

Hays asserts Thompson and Power Malls are liable for $84,875.00, being the amount received from the debtors by Thompson in connection with the assignment to PVCA of the

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[7] Aguilar calculated the amount to be $2,435,000.00. (D. Ex. 75.1). The cumulative exhibit introduced into evidence by JSM listed the total amount at $2,455,000. (See D. Ex. 68). It is unclear why the numbers calculated by the receiver and JSM differ. The minor differences do not affect the outcome of the decision.

Power Malls backup option. Hays asserts Thompson and Power Malls are liable under 11 U.S.C. § 548(a)(1) and (a)(2), and the Louisiana revocatory action.

Finally, Russell and Russkan are alleged to be liable for $43,000.00, representing the amount received by Russell from the debtors in connection with the assignment to PVCA of the Power Malls backup option. Hays asserts Russell and Russkan are liable under 11 U.S.C. § 548 (a)(1) and (a)(2), and the Louisiana revocatory action.

B. Section 548(a)(1)

1. Receiver's claim against JSM

The trustee has the burden of proving the elements of a fraudulent conveyance action under Section 548. In re McConnell, 934 F.2d 662, 665 n.1 (5th Cir. 1991); Grant v. Murrell, 148 B.R. 647, 649 (Bankr. M.D. Fla. 1992).

Section 548 of the Bankruptcy Code, 11 U.S.C. § 548(a) states in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation, incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily - -
>
> (i) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any

> entity to which the debtor was or became, on or after the data that such transfer was made or such obligation was incurred, indebted; or
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation, . . .

A transfer is avoidable under 11 U.S.C. § 548(a)(1) if: (1) it is a transfer of the debtor's interest in property; (2) that occurred within one year of the filing; and (3) was made with actual intent to hinder, delay, or defraud. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d 1248, 1254 (1st Cir.1991); In re Taubman, 160 B.R. 964, 983 (Bankr. S.D. Ohio 1993).

As to the first element, JSM contends that many of the payments were not funds of the debtors and do not constitute property of the estate that can be recovered by the trustee. This argument is made with respect to the payments made directly to JSM from the individual investors. This contention is without merit. The payments were made by the individual investors on behalf of the debtor corporations, usually PVCA.

The investors made the payments to JSM at the request of Recile or other representatives of the debtors. Some of the checks were endorsed by PVCA to JSM. (See Finding # 137). The deposit receipts prepared by JSM contemporaneously with the payments indicate credit was given to Place Vendome. (See Finding ## 136-140). The court finds that all of the payments made to JSM, whether by the debtor corporations or the individual investors are property of the estate. Thus, the receiver has shown the first element - a transfer of the debtor's interest in property.

As to the second element - the one year period, the receiver maintains that JSM received a total of $1,502,500.00 between September 27, 1991 and August 6, 1992. Thus, at least this portion of the total payments was made within one year of the bankruptcy filing on September 23, 1992. The receiver has proved the second element of Section 548 (a)(1) as to these payments.

The third element - actual intent, however, is the receiver's weak point. Courts frequently infer fraudulent intent from the circumstances surrounding a transfer, taking a particular note of certain recognized indicia or badges of fraud. FDIC v. Anchor Properties, 13 F.3d 27, 32 (1st Cir. 1994); Acequia. Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994). Among the more common badges of fraudulent intent at the time of a transfer are: (1) actual or threatened litigation against the debtor; (2) a purported transfer of all or substantially all of the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of the debtor; (4) a special relationship between the debtor and the transferee; and (5) retention by the debtor of the property

involved in the putative transfer. Id.; Max Sugarman, 926 F.2d at 1254. The presence of a single badge of fraud may spur mere suspicion; the confluence of several badges of fraud can constitute conclusive evidence of an actual intent to defraud, absent "significantly clear" evidence of a legitimate supervening purpose. Id.; 1254-55; Acequia, 34 F.3d at 806. Thus, once the plaintiff establishes indicia of fraud in an action under section 548(a)(1), the burden shifts to the transferee to prove some "legitimate supervening purpose" for the transfers at issue. Acequia, 34 F.3d at 806.

The receiver contends that the undisputed evidence shows that Recile acted with the actual intent to hinder, delay, and defraud investor-creditors of Hannover/Place Vendome in effecting transfers to JSM. This argument may well be true as to Recile's obtaining money from investors. Although Recile illegally and fraudulently induced investments for the project, it is not clear that he made the transfers to JSM with the intent to hinder, delay or defraud creditors. The badges of fraud are not present with respect to the transfers to JSM.

The first badge considers whether there is actual or threatened litigation against the debtor. Although the SEC litigation was pending against the debtors, there is no definitive evidence that JSM was aware of this before the issuance of the permanent injunction. Even if JSM was aware of the SEC litigation before the issuance of the permanent injunction (which has not been proved), JSM was still led to believe that the Place Vendome mall project could be a successful project if Recile could obtain the necessary financing. This belief or hope, at least initially, was also shared by Judge Livaudais, the SEC, and the special master.

Everyone was constantly being reassured that the financing was imminent. Thus, although there was actual litigation against the debtor, this did not under the circumstances of the case constitute a badge of fraud as to the transfers to JSM.

The second factor is whether there was a purported transfer of all or substantially all of the debtor's property. To the contrary, Recile raised tremendous sums of money from investors, probably six to seven times what he paid to JSM - much of which he spent on himself and his then friend Phillips.

The transfers to JSM were made for good and valuable consideration - in exchange for the transfers, the debtors received the option to buy the property, a very valuable asset. JSM owned valuable commercial property and wished to sell it to the debtors. The debtors were attempting to construct a shopping mall complex and desired to purchase the property. The debtors paid JSM reasonable compensation for the options and rights to the property which resulted in the property being "tied up" for over two years.

The receiver disputes this on several grounds. The receiver contends that the extension agreements were unrecorded, and the term of 24 hours in most cases was so short as to be meaningless. This argument is incorrect. The failure to record the extension had no effect on JSM's obligation to sell to the debtor if the debtors complied with the terms of the agreement in effect. Further, it was Recile's idea to have the short extensions, not JSM's. JSM was being cooperative in helping the debtor corporations close the deal in a situation in which the debtors were not able to come up.

with a 5% or 10% down payment, but believed that full financing was imminent.

Finally, the receiver contends Aguilar's assumptions are incorrect because Aguilar assumed that the property had a market value equal to the price agreed to be paid by Recile, whereas the evidence showed that Recile did not care what price he agreed to pay, and the option consideration paid by him was many times higher than that paid by others. The assertion is not borne out by the record. Recile needed JSM's property to complete the mall project. The evidence showed that this particular property was the most desirable location in Baton Rouge for another mall. Even if Recile agreed to pay a somewhat higher price to suit his particular needs, the resulting price was a fair price. The transactions between JSM and the debtors resulted from arms length negotiations and dealings. Thus, the second indicia is not met.

The third indicia is whether there is insolvency or other unmanageable indebtedness on the part of the debtor. As discussed infra at 51-53, the debtors were insolvent from the inception of their business. Even so, Recile promised everyone that new financing was imminent which would have solved the problem. At the time the transfers occurred, JSM had no way of knowing that the debtors were insolvent or that there was other unmanageable indebtedness on the part of the debtors. Consequently, although the debtors were insolvent, under the facts of this case the insolvency does not weigh in favor of a finding of proof of fraud on JSM's part.

The fourth factor is whether there was a special relationship between the debtor and the transferee. This factor

is clearly not present. JSM was not an insider vis a vis the debtors. Neither JSM nor Fuller had any previous business dealings with Recile or the debtors. The intimation by the receiver that there was a special relationship between the debtors and Colonel Weber, a purported agent or attorney for JSM, is not supported by the evidence.

The fifth indicia is whether the debtor retained the property involved in the putative transfer. This factor is also not present because the debtors did not retain the property involved in the putative transfers. The transfers made to JSM were not for the purpose of placing the funds outside of the reach of the debtors' creditors, with Recile or other officers or agents of the debtors maintaining control or use of such funds. There is no question that the funds paid to JSM were deposited into JSM's accounts and used for JSM's benefit. The fifth indicia has not been shown.

The receiver failed to prove that the transfers to JSM were made with intent to hinder, delay, or defraud. Accordingly, the receiver's claims under Section 548(a)(1) must be denied.

2. Claim against Thompson and Power Malls

The receiver failed to prove that the transfers to Thompson and Power Malls were made with intent to hinder, delay, or defraud creditors under Section 548 (a)(1). The analysis for Thompson and Power Malls as to the first, second, third, and fifth badges of fraud is the same as that for JSM. As to the fourth factor, Thompson and Power Malls did

not have a special relationship with the debtor corporations. Indeed, Thompson cancelled the assignment of the Power Malls backup option in favor of Place Vendome due to Place Vendome's failure to pay all sums due Power Malls under the assignment agreement. (See Finding ## 75-76). The receiver's claims against Thompson and Power Malls under Section 548 (a)(1) must be denied.

3. Claim against Russell and Russkan

Similarly, the receiver failed to prove that the transfers to Thompson and Power Malls were made with intent to hinder, delay, or defraud creditors under Section 548 (a)(1). The analysis with respect to Russell and Russkan as the first, second, third, and fifth badges of fraud is the same as that for JSM. With respect to the fourth factor, Russell and Russkan had an agreement with Recile wherein Place Vendome agreed to pay Russell and Russkan a substantial fee if Russell were successful in helping Place Vendome obtain financing for the mall project. (See Finding ## 81-82). Also, Russell negotiated through Beasley the Bluebonnet agreement that was to be flipped to the debtor corporations. (See Findings ## 83-90). Although this could be a finding as to the existence of a special relationship with Russell, the transfers of which the receiver complains occurred before Russell entered into this arrangement with Recile. Further, considering that the other badges of fraud are not present, the receiver has failed to prove the elements of Section 548 (a)(1) as to Russell and Russkan.

C. Section 548(a)(2)

1. Claims against JSM

A transaction is avoidable under Section 548 (a)(2) if it is a (1) a transfer of the debtor's interest in the property; (2) made within one year of the filing of the bankruptcy petition; (3) an exchange for which the debtor received less than a reasonably equivalent value; (4) made while the debtor was insolvent. In re McConnell, 934 F.2d 662, 664 (5th Cir. 1991).

The receiver has shown the first two elements of Section 548(a)(2) for at least a portion of the payments for the reasons previously discussed in connection with the analysis under Section 548(a)(1). See supra at 44.

The receiver has failed, however, to prove the third element, i.e., that the debtor received less than reasonably equivalent value, for the exchange. As discussed above, JSM gave a valuable right to the debtors in return for the payments received. The evidence shows that Recile managed to tie up this very valuable property of JSM, which was essential to Recile's financing efforts, for slightly over two years for less than one would generally have to pay for an option for that length of time. The value of the option to buy the property on which the Power Mall project was to be built was reasonably equivalent to the payments received.

Although the receiver can not prevail on his Section 548 (a)(2) claim because the third element is not met, the court will analyze the fourth element in order to be complete.

The fourth element considers whether the debtor was insolvent at the time of the transfers. Section 101(32)(A) of the Code, 11 U.S.C. § 101(32)(A), defines the term "insolvent" as:

> financial condition such that the sum of such entity's debts is greater than all of the entity's property, at a fair valuation, exclusive of - -
>
> > (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
> >
> > (ii) property that may be exempted from property of the estate under section 522 of this title.

11 U.S.C. § 101(32).

The receiver's attempts to prove insolvency consisted of: (1) the general argument that the debtor was engaged in a Ponzi scheme resulting in the debtors insolvency from the commencement of operations; and (2) the testimony of the receiver and introduction of Plaintiff's Exhibit B-5, a summary exhibit listing the "cumulative investor receipts" and the "cumulative note amounts" from August 3, 1990 to August 6, 1992.

JSM vigorously opposed the admissibility of Plaintiff's Exhibit B-5 on several grounds. The court does not deem it necessary, to consider Plaintiff's Exhibit B-5 because there is

ample evidence in the record that the debtors were in effect operated as a part of a Ponzi scheme, and were therefore insolvent at the time of the transfers.

A Ponzi scheme has been described as "a fraudulent investment arrangement in which returns to investors are not obtained from any underlying business venture but are taken from monies received from new investors". In re Taubman, 160 B.R. 964, 978 (Bankr. S.D. Ohio 1993). The court further stated:

> The promised rates of return, because they are in excess of any real investments, render a ponzi scheme operator insolvent from the inception of the scheme. As the scheme progresses and more and more investors are promised returns, the operator becomes more insolvent.

Id., citing, Cunningham v. Brown, 265 U.S. 1, 7, 44 S.Ct. 424, 425, 68 L.Ed. 873 (1924).

It is true that Recile was attempting to develop the mall project and if permanent financing had been obtained the project might have been successful. The financing, however, did not occur. The evidence showed that the only money Recile raised was from the investors, who were issued double-your-money promissory notes in return. Thus, every time Recile borrowed a dollar, he owed two and the debtors must have been insolvent, when the transfers occurred.

Further, when it is established that a debtor was insolvent at a date subsequent to the date of a transfer, and that the debtor's financial condition has not changed substantially during the interval, then insolvency at the prior time can be inferred from the actual and proven insolvency at the later date. In re Arrowhead Gardens, Inc., 32 B.R. 296, 301 (Bankr. D. Mass. 1983), aff'd Briden v. Foley, 776 F.2d 379 (1st Cir. 1985) ; Knapp v. Applewhite, 119 B.R. 285 (Bankr. M.D. Fla. 1990). This is a method some courts refer to as retrojection. In re Kavlor Equipment Rental. Inc., 56 B.R. 58, 62 (Bankr. E.D. Tenn. 1985). The debtors' schedules show that the net worth of the debtor corporations was in the range of negative $16,500,000 as of the filing date.[8] (Case No. 92-11010-JAB, P1. 18; Case No. 92-11013-JAB, Pl. 23; and Case No. 92-11014-JAB, Pl. 23).

The evidence showed that the only money Recile raised was from investors for which double-your-money notes were issued. Hays testified that the debtors received a net amount of only $500,000.00 from liquidation of the debtors assets, consisting mainly of real estate. There is no evidence that the assets were worth more than that amount. The value of these assets is insufficient to give the debtors a positive net worth. Therefore, although the debtors' insolvency as of the date of the transfers to JSM may not have been as great as that at the time of filing, it is clear that the debtors were never solvent. For these reasons, the receiver has shown the fourth element of Section 548(a)(2).

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[8] The same schedules were filed in each of the pending cases.

The receiver has failed, however, to prove the third element of his Section 548 (a)(2) claim against JSM and it therefore fails.

2. Claim against Thompson, Power Malls, Russell and Russkan

The receiver has failed to prove that the payments of $84,875.00 to Thompson and Power Malls, and of $43,000.00 to Russell and Russkan, for the assignment to PVCA of the Power Malls backup option was not a reasonably equivalent exchange of value. To the contrary, the evidence presented suggests that PVCA paid a fair price in exchange for receiving a valuable asset. The receiver's claims against Thompson and Power Malls under Section 548(a)(2) must be denied.

D. JSM's alternative defense under Section 548(c)

JSM argues in the alternative that even if the transfers were made with intent to hinder, delay, or defraud under Section 548 (a)(1), JSM is entitled to the "good faith" defense of 11 U.S.C. § 548(c).

Section 548(c) provides:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such transfer or obligation that takes for value and in good faith has a lien on or may restrain any interest transferred or may enforce any obligation

> incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c). If a transaction is voided under Section 548 (a), this portion of the section permits an initial transferee who takes for value and in good faith to retain any interest transferred to the extent the transferee gave value to the debtor in exchange for the transfer.

The court has found that the transfers are not voidable under Section 548(a), but will consider JSM's alternative defense. JSM bears the burden of proving it is entitled to the benefits of Section 548(c). In re Candor Diamond Corp., 76 B.R. 342, 351 (Bankr. S.D. N.Y. 1987). Good faith is indispensable for the transferee who would recover any value given pursuant to 11 U.S.C. § 548(c). Id.

The receiver argues that JSM failed to show that it was in good faith in receiving transfers from Place Vendome, totaling $1,502,500.00 between September 27, 1991 and August 6, 1992. The receiver cites a number of cases in support of his contention, many of which do not involve a determination of good faith under Section 548 (c). See Pl. 214, Receiver's Post-Trial Memorandum at 9-11.

The Code does not define "good faith", and the courts have defined it in various ways. In re Independent Clearing House Co., 77 B.R. 843, 861 (D. Utah 1987). Courts have recognized that good faith "is not susceptible of precise definition". In re Agricultural Research and Technology

Group, Inc., 916 F.2d 528, 536 (9th Cir. 1990). The Fifth Circuit has not made a determination as to the standard of good faith under Section 548(c).

If a defendant knew the debtor was running a Ponzi scheme at the time of the allegedly fraudulent transfer, that knowledge might indicate a lack of good faith. Independent Clearing House., 77 B.R. at 861-62. The Ninth Circuit has held that the court should "look to what the transferee objectively 'knew or should have known' in questions of good faith, rather than examining what the transferee actually knew from a subjective standpoint". In re Agricultural Research and Technology Group Inc., 916 F.2d at 535-36. The Ninth Circuit further stated:

> At least one court has held that if the circumstances would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a diligent inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent. In re Polar Chips Int'l., Inc., 18 B.R. 480 (Bankr. S.D. Fla. 1982). [Emphasis in original].

Id. at 536.

Based on these precepts, JSM has shown it was in good faith when it received the transfers from the debtors. JSM was not an insider of the debtors, was not an investor of the debtors, and had no inside information. Continuous representations were being made to JSM by the debtors about the financial stability of the debtors as well as the imminence

of their financing. JSM was not the only one led down the primrose path by Recile's salesmanship. Judge Livaudais allowed the debtors to continue money raising activities under the supervision of the SEC and the special master for over a year before the permanent injunction was issued.

Further, all of the property sales and escrowed sales involved JSM receiving cash for the entire purchase price The receiver has not shown sufficient facts and/or law to put JSM on notice that it should have made inquiries into the source of funds for the various payments or investigated independently the reliability of the debtors' proposed financing.

Even if, however, JSM may have been lax in its investigation of the debtors' finances and financial affairs, this does not equate to bad faith or the lack of good faith. The debtors were being investigated at the time by the SEC, the special master, and the special master's attorney. None of them ever advised JSM of any improper conduct or any wrongful actions on the part of the debtors. The reports submitted to the federal district court did not indicate that the project was not feasible or viable, or that it would be impossible for the debtors to obtain permanent financing for the project. Hays testified that he never advised the federal district court that the purported lending institutions were not legitimate or capable of funding the required loans to he debtors.

JSM was never provided with any information from Hays, his attorney, or the SEC. JSM was not served with pleadings or copied on correspondence. When Schneider, the attorney for JSM, contacted Videau, the attorney for the SEC,

she advised him that she would not discuss the situation with him and refused to divulge any information.

The receiver also attempted to link Colonel Weber to the activities of the debtors in an attempt to show JSM was not in good faith. The evidence, however, did not support this assertion. Weber was not engaged or involved as representative, attorney or agent of JSM. The testimony of Westbrook indicates that Weber merely advised her that the project was proceeding well and that the financing for the project was imminent. Weber was very optimistic about the project and conveyed his optimism to Westbrook on various occasions. Fuller testified that Weber was not JSM's attorney, and that he did not confer or consult with Weber. Schneider testified that Weber was not his co-counsel and that he had no discussions or communications with Weber at all. Beasley also testified that Weber did not represent JSM. There is no evidence that Weber was engaged in the solicitation of investors or negotiations with any potential lenders or in any aspects of the Place Vendome mall project. It is not clear why Weber ate lunch at the compound. It is clear, however, that Weber was not representing JSM and was not acting on behalf of JSM while he was there. The only reports that he gave to Westbrook were very optimistic and further led JSM to believe that the Place Vendome mall project would be developed by Recile and the debtors.

Based upon its belief that Recile and the debtors would develop the project, JSM, at least for the first year or so, did not market its property, did not actively solicit other potential purchasers for the property, did not list the property with a

real estate agent, and refused to negotiate with other, potential purchasers.

All of the witnesses testified that Recile was extremely persuasive and an extraordinarily talented salesman. Olinde testified that Recile "could sell snow to the Eskimos".[9] Recile was constantly reassuring Fuller that the project would be completed and successful and that the property would be purchased. Copies of loan commitments and other documents (which hindsight shows are worthless) were sent to Fuller which supported Recile's representations. Although Fuller may have had reservations and concerns, this did not rise to the level of bad faith. There is no evidence that JSM knew that Recile and the debtors were running a Ponzi scheme. Even considering the strict objective standard of the Ninth Circuit. set forth in Agricultural Research and Technology Group, there is no indication that JSM knew or should have known of Recile's fraudulent actions. Accordingly, the court finds that JSM was in good faith.

Section 548(c) also requires that the transferee give "value" to the debtor in exchange for the transfer. The extent to which a defendant gives value for a transfer is essentially the flip side of the question of whether the debtor received a "reasonably equivalent value" in exchange for the transfer

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[9] Recile was recognized almost 30 years ago as a dynamic and aggressive real estate promoter and a financial wizard who had acquired numerous pieces of valuable real estate in Louisiana while still in his twenties. In re Southern Land Title Corp., 301 F.Supp. 379, 384, 414 (E.D. La. 1968).

under Section 548(a)(2). In re Independent Clearing House Co., 77 B.R. at 861. As previously determined, JSM gave the debtor a "reasonably equivalent value" i.e. tied up valuable real estate for a period slightly over two years in exchange for the transfers.

Accordingly, even if the transfers of cash from the debtors to JSM were voidable under Section 548 (a) then Section on 548 (c) would be applicable to the transfers made to JSM and would allow JSM to retain the cash transfers which it took for value and in good faith.

E. Section 544 (b) and the Louisiana Revocatory Action

1. Claim against JSM

Section 544 (b) of the Bankruptcy Code authorizes the trustee to avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under . . . this title". The applicable law in this instance is the Louisiana revocatory action.

The receiver seeks to avoid the transfers to JSM under the Louisiana revocatory action, codified in the Louisiana Civil Code as article 2036, which provides:

> An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of

> the obligee arose, that causes or increases the obligor's insolvency.

La. Civ. Code Ann. art 2036 (West 1987).

To prevail in a revocatory action the plaintiff must prove: (1) pre-existing and accrued indebtedness, (2) that causes or increases the insolvency of the debtor. La. Civil Code art. 2036; Central Bank v. Simmons, 595 So.2d 363, 365 (La. App. 2nd Cir. 1992). It is no longer necessary that fraud be shown in order to succeed in a revocatory action. Thomassie v. Savoie, 581 So. 2d 1031, 1034 (La. App. 1st Cir. 1991).

Insolvency exists when the total of the obligor's liabilities exceeds the total of his fairly appraised assets. Central Bank v. Simmons, 595 So. 2d at 365. The federal statutes relating to bankruptcy and the method of determining solvency use virtually the same terms as those of the Louisiana revocatory action. Harman v. Defatta, 182 La. 463, 162 So. 44, 47-48 (1935) (referring to the definition of "fair valuation" under the Bankruptcy Act). The court has previously determined that the debtors were insolvent on the dates of the transfers to JSM. Consequently, the receiver has shown the second element of the revocatory action.

JSM argues that the receiver is limited to recover only payments made within one year of the filing date of the bankruptcy petition. This is incorrect.

Generally, the prescriptive period for filing a revocatory action is "one year from the time [the obligee]

learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or the result". La. Civ. Code Ann. art. 2041 (West 1987). If, however, the obligees are represented by a trustee in bankruptcy, then the two-year prescriptive period of 11 U.S.C. § 108 prevails. Comment (c) to La. Civ. Code Ann. art. 2041 (West 1987).

This adversary proceeding was filed on February 18, 1994, well within two years of the last payments made to JSM. Further, the transfers were made as part of a continuing pattern, rather than as discrete, separate transfers. Thus, it is sufficient that the last transfer was within the two year period.

Finally, JSM asserts that the exception contained in Louisiana Civil Code article 2040 is applicable to deny the receiver' s claims. Article 2040 provides that "An obligee may not annul a contract made by the obligor in the regular course of his business". La. Civ. Code. Ann, art. 2040 (West 1987).

The best in-depth analysis of the ordinary course of business exception under Louisiana law was made over 100 years ago in Hirsch v. Fudicker, 43 La.Ann. 886, 9 So. 742 (1891). In Hirsch, an insolvent debtor sold the entire contents of his store to a third party. The debtor's creditors instituted a revocatory action. The Louisiana Supreme Court affirmed the trial court's judgment in favor of the defendant. The court noted that the appellants failed to show any evidence that the third-party purchaser had any knowledge of the debtor's fraudulent purposes. In interpreting former Louisiana Civil

Code article 1986 (now Article 2040), the court held that a sale for cash made to a third person who was not a creditor must be considered as one made in the ordinary course of business, if made for an adequate consideration, paid in cash or its equivalent. Thus, Article 2040 is designed to protect innocent third parties to a transaction which may otherwise be subject to a revocatory action by creditors.

JSM is in a similar position to the defendant, Fudicker. JSM was not involved in Recile's fraudulent activities, and received fair consideration for giving the debtors options to purchase land necessary to complete a mall project which was the whole point of the debtors' business. The transfers were in the ordinary course of business and may not be annulled.

Recile, in one corporate form or another, has been taking options, executing contracts to buy and sell, and purchasing real properties, for development and/or improvements in Louisiana for over 30 Years. See supra note 9, at 58. He is the quintessential wheeler/dealer real estate promoter and developer. Paying sums for options on real property was a regular part of his business. Thus, the transfers may not be annulled by the revocatory action.

The receiver has failed to prove a cause of action against JSM under the Louisiana revocatory action.

2. Claims against Thompson, Power Malls, Russell and Russkan

The ordinary course of business exception of Article 2040 is also applicable to Thompson, Power Malls, Russell,

and Russkan. There is no evidence that these defendants were involved with Recile's fraudulent activities at the time they received the funds for the sale of a valuable option contract to PVCA. Russell and Russkan's closer involvement with Recile was at a later time when Russell was attempting to raise construction financing for the mall project. The receiver's claims under the Louisiana revocatory action must be denied.

F. Other claims under state law against JSM

1. The bond for deed theory

The receiver also argues Section 544 (b) is applicable to void transfers based upon the Louisiana law providing for a bond for deed contract. Specifically, the receiver seeks to avoid the payment of $400,000 to JSM on April 8, 1991.

The receiver contends that the payment of April 8, 1991 was a bond for deed contract that must be annulled in accordance with Louisiana Civil Code articles 2029-2033. The receiver cites La.R.S. 9:2946 of the bond for deed statute which provides in pertinent part:

> It shall be unlawful for any seller in a bond for deed contract to require promissory notes to represent the purchase price or any portion thereof, if the property should be encumbered with a mortgage or privilege.

La. Rev. Stat. Ann. 9:2946 (West 1991).

In Louisiana there are three elements that must be present for a contract to be characterized as a bond for deed: (1) the contract must be one to sell real property, (2) the purchase price must be paid to the seller in installments, and (3) the seller must withhold transferring title to the buyer until payment of a stipulated sum. La. Ray. Stat. Ann. 9:2941 (West 1991).

Although the first and perhaps the third elements were established, the receiver failed to prove the second element, i.e. that the purchase price must be paid to the seller in installments.

Bond for deed contracts have been found in cases that provide for "installment payments" to be paid at specific and regular intervals over a lengthy period of time, the total of the installment payments equaled the total purchase price, and the seller was obligated to transfer title upon receipt of the final installment payment See Gray v. James, 503 So. 2d 598 (La. App. 4th Cir. 1987) (three installments paid over an 11 month period); Prejeant v. Hero Lands Company, 244 So. 2d 613 (La. App. 4th Cir. 1971) (monthly payments of $7.50 until payment of $1,000 plus 6% interest); Leinhardt v. Marrero Land & Improvement Ass'n., 137 So. 2d 387 (La. App. 4th Cir. 1962) (price of $5,725 payable in monthly installments of not less than $10.00 nor more than $215.00)

In the instant case, payments were made by the debtors to JSM in consideration of the extension of the purchase agreement and the time for closing the acts of sale. The extension payments were clearly not installment payments, but were option payments and extension payments. Further, Uter

and Schneider testified that the parties never intended to enter into a bond for deed contract. Their testimony is supported by the other evidence.

The receiver' s bond for deed argument is an attempt to fit a square peg in a round hole. It will not fit. The April 8, 1991 contract was not a bond for deed contract.

2. Partial payments under addendum of July 6, 1991

Place Vendome transferred $50,000 on July 8, and $50,000 on July 15, 1991 under the extension agreement of July 6, 1991. (See Finding # 47). The receiver argues that Place Vendome received nothing in exchange for the transfers, and that the transfers were "wholly ineffective and failed to extend the time within which Hannover/Place Vendome could have purchased the property." (Pl. 214, Receiver's Post-Trial Memorandum at 22).

The receiver contends the extension agreement of July 6, 1991 was ineffective because it called for payments of $100,000 on July 8, and $100,000 on July 15, 1991. Therefore, the receiver argues that because the payments were not made as required by the extension agreement of July 6, 1991, the Power Malls back-up option of March 13, 1991 became the first and primary option affecting the property. Consequently, the receiver argues that pursuant to the provisions of Louisiana Civil Code Article 2029, "[a] contract is null when the requirements for its formation have not been met". La. Civ. Code Ann. art. 2029 (West 1987). Further, the effect of an absolutely null contact or a relatively null

contract that has been declared to be null by the court, is that the contract is "deemed never to have existed.". La. Civil Code Ann. art. 2033 (West 1987).

These assertions are unacceptable. Merely because the extension agreement of July 6, 1991 called for three payments of $100,000.00 each, and the debtors made only two payments of $50,000.00, does not mean that the entire contract is null and void. Theoretically, JSM could have terminated the July 10, 1990 option because of the debtors' failure to pay, but it did not. JSM obviously waived its rights to receive the full down payment under the extension agreement of July 6, 1991, and entered into an escrow agreement closing on July 31 1991. (See Findings ## 48-49). JSM considered itself to be bound by the extension agreement of July 6, 1991, and acted as if it were bound by the extension. The Power Malls back up option did not become first in priority.

The receiver's arguments may not prevail.

3. Payment of $250,000 on September 27, 1991

The receiver claims that the September ___, 1991 agreement was not effective to prevent the Power Malls' backup option from becoming a first option on the property. Thus, the receiver asserts that Place Vendome received no value for its transger to JSM of $250,000 on September 27, 1991.

This argument is without merit. The September ___, 1991 agreement was a valid agreement that extended the July

31, 1991 closing and the payment if the $5 million until November 15, 1991. (See Finding # 58).

4. The November 15, 1991 agreement

The receiver argues that JSM was incapable of performing in accordance with the November 15, 1991 agreement because JSM could not convey merchantable title on that date due to a number of liens on the property. As a consequence, the receiver contends that the Power Malls' backup option was "illegal, null and void", the agreement of November 15, 1991 must be set aside, and the $1,270,000 transferred with respect thereto returned to the receiver.

The agreement of November 15, 1991 stipulated that the closing would be held on or before November 20, 1991. No closing occurred by November 20, 1991. The receiver contends that as of November 20, 1991 there were several recorded judgments and liens against the property, including: (1) the Power Malls backup option of March 13, 1991; (2) collateral mortgage of March 11, 1988 by JSM in favor of any future holder in the amount of $6,500,000.00; (3) Sales and/or Use Tax Assessment and Lien in favor of the City of Baton Route in the amount of $1,190,978.81; and (4) judgment in favor of David Adler, trustee in the bankruptcy of Marvin and Virginia Gorman, in the amount of $10,000,000 resulting from Civil District Court judgment of October 23, 1991.

All of the real estate attorneys who testified at the trial-Crochet, Schneider, Uter, and Beasley - agreed that the seller of property has until the time of the closing of the act of sale to clear any encumbrances affecting the property and to

"tender good and merchantable title. Further, encumbrances can be cleared in a variety of ways. They can be cleared from the purchase price itself whereby the closing attorney retains funds from the purchase price sufficient to satisfy all encumbrances if these funds are insufficient, the seller can provide additional funds at the closing. The party holding the encumbrances can grant a partial release whereby he releases a particular portion of the property and retains a lien on the remaining property securing his claim. Because the parties never got to the point of closing, it is pure speculation by the receiver that JSM would not have been able to have the encumbrances affecting the property cancelled and erased.

The Gorman judgment was null and void and without any legal effect as a judicial mortgage against JSM's property because the judgment had been set aside by the trial court which had granted a motion for new trial and an amended judgment on November 15, 1991. (See Finding #59). This amended judgment was never recorded. (Id.) As a result, the October 23, 1991 judgment was null and void on November 20, 1991. See Abnev v. Allstate Insurance Co., 442 So.2d 590 (La. App. 1st Cir. 1983) and Mitchell v. Windham, 426 So. 2d 759 (La. App. 3rd Cir 1983) (Original judgment is vacated when motion for new trial is granted). Further, according to Westbrook's testimony, the entire liability was covered by insurance policies in force and effect at the time.

An additional problem with the receiver' s argument is that the debtor corporations, never tendered the purchase price by November 20, 1991. In the case of Goudeau v. Daigle, 124 F.2d 656 (5th Cir.1942), cert. denied, 316 U.S. 695 (1942), the purchaser did not provide the cash portion of the

purchase price within the applicable time delays. The seller had the obligation to provide an acceptable abstract of title and deed, and to give merchantable title to the purchaser. The Fifth Circuit found that the seller never furnished the abstract to purchaser, and that the purchaser never called upon the seller for the abstract or ever tendered to him the balance of the purchase price. The Fifth Circuit held that because of the purchaser's own breach of the agreement, the purchaser's inability to timely tender the purchase price and failure to place the seller in default, the purchaser was not entitled either to specific performance or damaces or a refund of the deposit. The court stated:

> Even in commutative contracts where the reciprocal obligations are not to be performed at the same time, a party wishing to put the other in default must himself be ready, and must offer to receive the performance of the other. Where the breach is passive, putting in default is an essential prerequisite to the recovery of damages therefor.

Goudeau, 124 F.2d at 657-58. See also Di Cristina v. Weiser, 215 La. 1115, 1123, 42 So.2d 868, 870 (1949) (When reciprocal obligations are to be performed at the same time, the party who wishes to put the other in default must offer to perform as the contract requires at the time and place expressed in, or implied by the agreement, otherwise the opposite party will not be legally put in default).

In the pending case, JSM was never placed in default because the debtors were never able to perform under the

terms of the agreement of November 15, 1991. The debtors never notified JSM of any title problems or problems created by any encumbrances against the property in order to give JSM the opportunity to clear the encumbrances. Thus, they can not place JSM in default for failing to be able to deliver merchantable title. Further, even if the debtors were able tender the purchase price, there has been no showing that JSM was unable to deliver merchantable title.

G. Counterclaim of JSM

JSM has filed a counterclaim against the receiver for wrongful seizure of its property, wrongful filing of a lis pendens against JSM's property, and for the bad faith opposition to its motion for partial summary judgment. JSM has failed to prove the allegations in its counterclaim. Therefore, judgment will be entered in favor of the receiver on JSM's counterclaim.

III. Conclusion

The receiver has set forth several theories for recovery of the payments made by the debtor corporations to JSM and the other defendants and has vigorously pursued these theories. The receiver has not, however, crystallized his theories of recovery into a single, coherent theory supported by evidence. To the contrary, his approach offers the court a menu from which the court is expected to select an appropriate theory of recovery and then sculpt the evidence to fit that theory. There is ample evidence supporting the receiver's claim that Recile engaged in all sorts of illegal activities, but there is no substantial evidence that JSM was a

party to, knew of, or was put on notice of sufficient facts, that it should have known of such illegal activities when it accepted the numerous transfers of money and agreed to allow the debtors to tie up valuable real estate for the lengthy amount of time here involved. The receiver has similarly failed to prove any liability by the other defendants. The receiver has failed to carry his burden of proof.

Judgment will be issued in accordance with this memorandum opinion.

New Orleans, Louisiana, this 7th day of September, 1995.

/s/_____
JERRY A. BROWN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX G

Text of Bankruptcy Code and Federal Rules of Evidence Provisions Involved in Case

11 USCS §548 (2003)

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any

obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in

connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986 [*26 USCS §170*(c)], if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986) [*26 USCS §731*(c)(2)(C)]; or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986 [*26 USCS §170*(c)(1)]; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986 [*26 USCS §170*(c)(2)].

Text of Bankruptcy Code and Federal Rules of Evidence Provisions Involved in Case

11 USCS §550 (2003)

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [subsection] (a)(2) of this section from--

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes--

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

Fed. R. Evid. 201

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In

the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Supreme Court, U.S.
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No. 02-1281

In The

Supreme Court of the United States

WILLIAM G. HAYS, JR., Receiver and Disbursing Agent on Behalf of Debtors, Hannover Corporation, Et Al.,

Petitioners,

v.

JIMMY SWAGGART MINISTRIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Fifth Circuit Court of Appeals, based upon the decisions of the trial court and the factual findings of the trial court, apply the proper standards under 11 U.S.C. § 548(c)?

2. Is the decision of the United States Fifth Circuit Court of Appeals in conflict with the decisions of any other circuit court of appeals?

3. Were the petitioner's due process rights violated as a result of the decision rendered by the United States Fifth Circuit Court of Appeals?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
I. INTRODUCTION	2
II. OVERVIEW	3
III. JSM DISPUTES THE "FACTS" ALLEGED BY HAYS IN HIS WRIT APPLICATION	7
IV. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE OTHER CIRCUIT COURTS OF APPEALS AND SETS FORTH THE PROPER CRITERIA IN CONSIDERING GOOD FAITH AND REASONABLE EQUIVALENT VALUE UNDER § 548(c) OF THE BANKRUPTCY CODE	11
A. Good Faith	11
B. No Conflict with Other Circuits Concerning Value	14
C. Value of Option on Real Property; Real Right	17
D. Criteria that Hays Would Have This Court Establish, Would Cause Havoc in Commercial Transactions	19
E. Fifth Circuit Decision Follows This Court's Decision on Value	20

TABLE OF CONTENTS – Continued

Page

F. Hays Asserts False Premises Contradicted by the Record 21

V. HAYS'S DUE PROCESS RIGHTS WERE NOT VIOLATED 23

VI. CONCLUSION 25

Appendix

Appendix A

Text of Bankruptcy Code and Louisiana Civil Code involved in case 1a

TABLE OF AUTHORITIES

Page

CASES:

In re: Agricultural Research and Technical Group, 916 F.2d 528 (9th Cir. 1990).....11

Associates Commercial Corporation v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).....20, 21

Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership, 526 U.S. 434, 1119 S.Ct. 1141, 143 L.Ed.2d 607 (1999).....18, 19

Brown v. First National Bank of Little Rock, Arkansas, 748 F.2d 490 (8th Cir. 1984)..... 9

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Com & Nate Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (Ct. App. 7th Cir. 1990) 19

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De Angio v. De Angio, 544 F.2d 863 (8th Cir. 1977) 9

George v. Manhattan Land and Fruit Co., No. 6079, 51 F.2d 28 (5th Cir. 6/29/31).....18

In re: Grand Chevrolet, Inc., 25 F.3d 728 (9th Cir. 1994).....17

TABLE OF AUTHORITIES – Continued

Page

Hayes v. Jimmy Swaggart Ministries (In re Hannover Corp.), 2002 U.S. App. Lexis 24649 (5th Cir. 2002) 1

Hays v. Jimmy Swaggart Ministries, 263 B.R. 203 (Bnkr. M.D. LA 1999) 1

Huffman v. Commerce Security Corp. (In re: Harbour), 845 F.2d 1254 (4th Cir. 1988) 11

In re: Jet Florida Systems, Inc., 861 F.2d 1555 (11th Cir. 1988) 17

Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.), 310 F.3d 796 (5th Cir. 2002) 1

In re: M&L Business Machine Co., Inc., 84 F.3d 1330 (10th Cir. 1996), *cert. denied*, 519 U.S. 1040, 117 S.Ct. 608, 138 L.Ed.2d 534 (1996) 11

In re: Morris Communication of North Carolina, Inc., No. 88-3060, 88-3062, 914 F.2d 458 (4th Cir. 9/13/90) 15

Premier Bank National Association v. Stout, 627 So.2d 1888 (La. App. 3rd Cir. 1994) 9

In re: R.M.L., Inc., 92 F.3d 139 (3rd Cir. 1996) 14, 15

In re: West Dor, Inc., 996 F.2d 237 (10th Cir. 1993) 16

STATUTES:

11 U.S.C. § 544 ..... 1, 6, 23

11 U.S.C. § 547 17

11 U.S.C. § 548 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Louisiana Revocatory Act, Louisiana Civil Code of 1870, Book III, Title IV, Chapter 12, Sec. 1, Arts. 2036-2043 (West Group 2001) 2, 9

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La.C.C. Art. 2040 ..... 2, 6, 23, 24, 25

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BRIEF IN OPPOSITION

Respondent respectfully opposes the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Hayes v. Jimmy Swaggart Ministries (In re Hannover Corp.), 2002 U.S. App. Lexis 24649 (5th Cir. 2002).

Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.), 310 F.3d 796 (5th Cir. 2002).

Hays v. Jimmy Swaggart Ministries, 263 B.R. 203 (M.D. 1999).

JURISDICTION

Respondent does not contest the jurisdiction of this Honorable Court.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 544 (West 2003)

(See Appendix A for text.)

11 U.S.C. § 548 (West 2003)

(See Appendix A for text.)

Louisiana Revocatory Act

Louisiana Civil Code of 1870, Book III, Title IV, Chapter 12, Sec. 1, Arts. 2036-2043 (West Group 2001) – Louisiana Revocatory Act.

(See Appendix A for text.)

La.C.C. Art. 2036, "Act of the Obligor that Causes or Increases His Insolvency"

(See Appendix A for text.)

La.C.C. Art. 2040, "Contracts Made in Ordinary Course of Business."

(See Appendix A for text.)

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner Hays makes four arguments in support of his writ application; none have merit. First, Hays claims, erroneously, that the opinion below creates a dispute among the circuits; this is incorrect and results from Hays's misreading of the opinions upon which he relies. Second, Hays argues that the Fifth Circuit's opinion conflicts with the plain language of § 548(c); this is a misinterpretation of the Fifth Circuit's opinion. Third, Hays claims that, despite the high standard set by the "clearly erroneous" standard of review of factual findings, this Court should reverse the Fifth Circuit's holding that the Bankruptcy Court's factual findings were not clearly erroneous; this issue is not worthy of writ consideration.

Finally, Hays complains that the appellate court ruled on issues not briefed; however, this is also incorrect.

Respondent Jimmy Swaggart Ministries ("JSM") also disputes Hays's factual allegations set forth in his statement of the case. As shown below, a number of these alleged factual statements are not supported by the record, are contrary to the factual findings of the trial court, or are contrary to the evidence introduced during the trial on the merits.

II. OVERVIEW

This case involves the failed attempt of various corporations which were formed by Sam Recile to develop a shopping mall in Baton Rouge, Louisiana. In order to raise capital to finance the project, Recile violated state and federal securities laws. As a result, the United States Securities and Exchange Commission ("SEC"), filed a complaint in April of 1991 in the United States District Court for the Eastern District of Louisiana requesting injunctive relief as well as the appointment of a permanent receiver. Initially, a temporary restraining order was issued in the SEC lawsuit, ordering the debtor corporations and Recile to cease all operations and all fund raising activity. This temporary restraining order ("TRO"), lasted for approximately three days, at which time an amended TRO was entered by the district court with the consent of the parties. The amended TRO allowed the debtors to continue to operate and to raise funds from certain qualified investors as defined in the TRO and, specifically, to make payments to maintain the options on

real property, which were necessary for the success of the project.[1]

Prior to the institution of the SEC lawsuit, one of the debtor corporations had obtained an option on very valuable real property owned by JSM; JSM received approximately $800,000.00 in option payments for the period of July 1990 through April 1991.[2]

JSM learned of the institution of the SEC lawsuit and Recile's possible violations of state and federal securities laws through a newspaper article in a local newspaper in Baton Rouge, Louisiana.[3] After reading the article, JSM had its attorneys contact the SEC's counsel to determine if JSM could continue to negotiate with the debtor corporations and to receive the option payments. The attorney for the SEC refused to discuss the matter with JSM's attorney and merely directed him to review the court orders issued in the SEC lawsuit.[4] After reviewing the amended TRO and subsequent preliminary injunction, both of which provided that the debtors could continue to make option payments to the landowners, including JSM, JSM was satisfied that it could continue to negotiate with the

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[1] Appendix F to the Petition for Writ of Certiorari, Memorandum Opinion of the United States Bankruptcy Court for the Middle District of Louisiana, September 7, 1995 (hereinafter the "Bankruptcy Court Opinion"), p. 67a, p. 76a, and p. 107a.

[2] Bankruptcy Court Opinion, pp. 71a-73a, 75a.

[3] Appendix B to the Petition for Writ of Certiorari, Opinion of United States Court of Appeals for the Fifth Circuit, October 29, 2002 (hereinafter the "Fifth Circuit Opinion"), p. 11a.

[4] Bankruptcy Court Opinion, pp. 128a-129a.

debtors and to accept option payments and extension payments.[5]

There is no question or dispute that JSM's land was the most valuable property to be obtained by the debtors in furtherance of the project and that the maintenance of the option on JSM's land was absolutely essential for any hope of success for the project and the repayment of investors and other creditors. There is no question that, if the options on JSM's property were terminated, the project would immediately fail and none of the investors or creditors would be repaid.[6]

The debtors were allowed to continue to operate, raise funds and to make the option payments to the various landowners until the permanent injunction (which also appointed Hays as the permanent receiver) was rendered in the SEC lawsuit on July 29, 1992, a period of approximately fifteen months. The Bankruptcy Court found, as a matter of act, that at all times JSM complied with all district court orders issued in the SEC lawsuit; at no time did it engage in or assist Recile in any fraud, misrepresentation or any other wrongful acts.[7]

In September of 1992, Hays filed voluntary bankruptcy petitions on behalf of the debtor corporations; the cases were subsequently consolidated, and a liquidating plan for the debtor corporations was confirmed by the bankruptcy court. In February of 1994, Hays filed an

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[5] Fifth Circuit Opinion, p. 11a.

[6] Bankruptcy Court Opinion, pp. 117a-118a.

[7] Bankruptcy Court Opinion, pp. 68a-69a.

adversary complaint against JSM and others. In the adversary complaint, Hays sought to revoke the transfers made by the debtors, as well as transfers made by other third parties, pursuant to the provisions of 11 U.S.C. § 544 and 548. Under 544, Hays sought recovery under the Louisiana Revocatory Act.[8]

After an extensive and protracted trial on the merits, the bankruptcy court found in favor of JSM and dismissed all claims asserted by Hays. The bankruptcy court found, inter alia, that JSM was entitled to the defense under 11 U.S.C. § 548(c) because it had acted in good faith and given reasonably equivalent value to the debtors in consideration of the transfers it received. Additionally, the bankruptcy court found that Hays could not recover under the Louisiana Revocatory Act because under La.C.C. Art. 2040, transfers cannot be avoided if the transfers are made in the ordinary course of the obligor's business.[9]

Hays timely appealed to the district court, which reversed the decision of the bankruptcy court and rendered judgment in favor of Hays and against JSM.

A timely appeal was taken to the United States Fifth Circuit Court of Appeals by JSM. JSM requested that the decision of the district court be reversed and that the judgment of the bankruptcy court be reinstated and that the claims asserted by Hays under § 548 and § 544 (the Louisiana Revocatory Act), be dismissed.

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[8] Fifth Circuit Opinion, pp. 6a-7a.

[9] Bankruptcy Court Opinion, pp. 131a-134a.

The Fifth Circuit reversed the decision of the district court and reinstated the decision and judgment of the bankruptcy court dismissing all claims against JSM. The Fifth Circuit found that JSM met its burden of proof under 11 U.S.C. § 548(c) and it affirmed the decision of the bankruptcy court denying recovery under the Louisiana Revocatory Act finding that the transfers were made in the ordinary course of the debtors' business. The Fifth Circuit did not address the other issues raised on appeal.

III. JSM DISPUTES THE "FACTS" ALLEGED BY HAYS IN HIS WRIT APPLICATION

JSM disputes the allegations made by Hays, on pages 1 and 2 of his Petition, that "the debtor corporations were the creation of Samuel J. Recile, who used them in a massive fraudulent scheme in which the debtors borrowed more than $15 million from scores of individuals throughout the country by issuing promissory notes promising short term returns (thirty to sixty days) of 100% or more."

The record in this case, as well as the findings of the bankruptcy court, indicate that the "investors" were individuals who knew that the project was a very high risk venture. They were given "double your money back" promissory notes to be paid within 30 to 60 days, plus 18% interest thereon. Additionally, these "investors," even after becoming aware of possible violations of the federal and state securities laws by Recile and the possible fraud on the part of Recile, continued to invest money in the debtor

corporations, or to send money directly to JSM in order to maintain the options on the property.[10]

Hays incorrectly maintains that Recile secretly created new corporate entities to continue his unlawful money-raising activities. There is no evidence in the record to substantiate this claim, and no such findings were made by the trial court. Indeed, the orders of the district court allowed Recile to continue to raise funds from investors.[11]

Hays further miscategorizes some of the options which were granted by JSM to the debtor corporations. Prior to 1992, all of the options and extensions were for periods of three to six months and were entered into under normal business terms for reasonable consideration.[12]

Commencing in December of 1991 and January of 1992, under the belief and advice that the permanent financing to exercise the options was coming forthwith, JSM entered into various short term option agreements with Bluebonnet Transfer Corporation. Bluebonnet Transfer Corporation was a separate entity which was not one of the debtor corporations. JSM received payments from Bluebonnet Transfer Corporation ("Bluebonnet") from January of 1992 through April of 1992. Under the terms of the agreements, which are set forth in the bankruptcy court's findings of facts,[13] in order to maintain the options

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[10] Bankruptcy Court Opinion, pp. 68a, 76a-78a.

[11] Record on Appeal to Fifth Circuit, Defendant's Exhibits 115, 116 and 118; and Plaintiff's Exhibits A-2, A-3, A-4 and A-8.

[12] Bankruptcy Court Opinion, pp. 71a-76a, 78a-82a, 84a-94a.

[13] Bankruptcy Court Opinion, pp. 94a-99a.

on the property (comprising more than 127.5 acres),[14] which were granted for periods of one week to two weeks, Bluebonnet was required to make payments varying from $7,500.00 per day to $10,000.00 per day. JSM had requested a more substantial option fee to be paid in advance for a period of three to six months; however, Bluebonnet indicated to JSM that the permanent financing was coming shortly and that it would prefer the method of making the daily payments for short-term extensions until the funding arrived.[15] The transfers of funds from Bluebonnet and other third parties, non-debtors, cannot be avoided under either the bankruptcy code or the Louisiana Revocatory Act.[16]

Hays further states that, Recile used copies of the fully executed but escrowed sales as well as copies of his phony loan commitments to mislead investors into believing that his project owned the land and had obtained permanent financing to build the shopping mall. This is not correct either. The record in this case does not support this statement. There was some evidence indicating that some of the loan commitments were not viable, however,

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[14] Bankruptcy Court Opinion, p. 68a.

[15] Bankruptcy Court Opinion, pp. 97a-98a.

[16] Under 11 U.S.C. § 548(a) only transfers of property of the debtor can be avoided. *Brown v. First National Bank of Little Rock, Arkansas*, 748 F.2d 490 (8th Cir. 1984); *Chase and Sandborn Corp. v. Sanchez*, 813 F.2d 1177 (11th Cir. 1987); *De Angio v. De Angio*, 544 F.2d 863 (8th Cir. 1977); *Coral Petroleum, Inc. Banque Paribas-London, et al.*, 797 F.2d 1351 (5th Cir. 1986). Additionally, under the Louisiana Revocatory Act, the transfers must deplete the debtor's estate and, therefore, must be property of the debtor. *Premier Bank National Association v. Stout*, 627 So.2d 1888 (La. App. 3rd Cir. 1994).

William Hays, when he served as special master, never advised the district court that the loan commitments were not viable or legitimate.[17]

Additionally, Hays is incorrect in asserting that JSM received $50,000 in violation of the permanent injunction. Subsequent to the appointment of Hays as the receiver for the debtors, a new corporation was formed, S'Avancer, Ltd., which was not owned by Recile nor any of the other debtor corporations. S'Avancer entered into a new option agreement with JSM and the funds received by JSM, were not the funds of the debtors or Recile. The bankruptcy court found that JSM acted in good faith in its dealings with S'Avancer in receiving the post-receivership funds from third parties.[18]

Hays further maintains that the debtors were at all times insolvent. JSM denies this allegation and maintains, and has maintained, throughout this proceeding that Hays failed to prove that the debtors were insolvent on the dates that the transfers were made.

Hays further states that JSM did not brief or argue the "ordinary course of business" defense to the Fifth Circuit. This is also incorrect. JSM, in a number of places, argued that the trial court was correct in substantiating this defense and raised all defenses under the Louisiana Revocatory Act.[19]

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[17] Bankruptcy Court Opinion, p. 128.

[18] Bankruptcy Court Opinion, pp. 108a-110a.

[19] Fifth Circuit Opinion, p. 20a; JSM (Appellant's) Brief to Fifth Circuit, pp. 14, 23 and 90.

IV. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE OTHER CIRCUIT COURTS OF APPEALS AND SETS FORTH THE PROPER CRITERIA IN CONSIDERING GOOD FAITH AND REASONABLY EQUIVALENT VALUE UNDER § 548(c) OF THE BANKRUPTCY CODE

A. GOOD FAITH

In Section I of the Petition concerning the good faith requirement under § 548(c), Hays misstates the law and the holdings of other circuit courts of appeals. Hays maintains that,

> "All seven circuits that have considered the issue have adopted an objective standard for good faith under § 548(c) . . . [Cites omitted.] . . .
>
> All of these circuits recognize that a transferee acts in bad faith when he has sufficient knowledge to place a reasonably prudent person on notice to the debtor's possible insolvency or fraud but does nothing."[20]

None of the circuit courts of appeal have taken such a simplistic approach in determining whether a transferee is acting in good faith. A review of the decisions on this point, including *Brown v. Third National Bank (In re: Sherman)*, 67 F.3d 1348, 1353 (8th Cir. 1995); *Huffman v. Commerce Security Corp. (In re: Harbour)*, 845 F.2d 1254, 1258 (4th Cir. 1988); *In re: Agricultural Research and Technical Group*, 916 F.2d 528, 535 (9th Cir. 1990); *In re: M&L Business Machines Co., Inc.*, 84 F.3d 1330, 1338 (10th Cir. 1996), *cert. denied*, 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d

[20] See pages 7 and 8 of Petition for Writ of Certiorari.

534 (1996) (discussing the good faith requirement under Section 548(c), the court stated, 'resolution of this issue requires a determination of whether the facts satisfy the proper legal standard, a mixed question of law an fact (cites omitted). In these circumstances, because the question of good faith is primarily factual, we will review the findings of the bankruptcy court for clear error, id. p. 1338), indicate that the federal appellate courts employ an intent factual scrutiny to determine the good faith of the transferee. All of the appellate courts recognize that the definition of "good faith" is not defined under the bankruptcy code and that good faith must be determined on a case-by-case basis.

This is exactly what was done in this case. The bankruptcy court[21] and the court of appeals considered the circumstances surrounding the transfers and the conduct of the transferee.[22] They considered: (1) whether the transferee

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[21] Bankruptcy Court Opinion, pp. 113a-119a, and 126a-131a.

[22] "The heart of the bankruptcy court's conclusion lies then, in the first set of questions – the transferee's state of mind. Once again, the bankruptcy court's findings are comprehensive, cogent and entitled to the respect due them under the clear error standard. We point here only to the most telling of a voluminous listing of findings. In regard to JSM's knowledge of the debtors corporations' insolvency, the bankruptcy court found, 'at the time that the transfers occurred, JSM had no way of knowing that the debtors were insolvent'. With regard to JSM's knowledge of the debtor corporations' fraudulent activities, Judge Brown found that JSM had read newspaper accounts of the SEC suit against Recile. Finally, with regard to JSM's duty of inquiry, Judge Brown found that JSM upon reading – and being duly alarmed by – these newspaper stories, undertook its own investigation, contacting the SEC and the federal district court and eventually receiving assurances from the district court that JSM could continue to receive option payments from Recile's corporations.

(Continued on following page)

was an insider of the debtor; (2) whether the transferee held a special position or had special knowledge concerning the affairs of the debtor which would give it an undue advantage over other parties; (3) whether the transfer involved all or substantially all of the debtor's assets; and most importantly, (4) whether the transfers were for fair and adequate consideration.

The Fifth Circuit performed a thorough intensive analysis of the facts and of intent in determining that JSM acted in good faith.[23]

The law review commentators also agree with the analysis conducted by the Fifth Circuit in this case. In Epstein Nickles White, *Bankruptcy, Practitioner Treatise Series*, Vol. 2, Section 6-46 to 9-30 (West Publishing Co. 1992), the commentators note that:

> "Here we focus on good faith for purposes of § 548(c). It is an indispensable element of this saving provision, but is not susceptible of precise definition. Good faith is a fact question that depends on the particular circumstances of each

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Based on its findings, the bankruptcy court's resulting legal conclusion is unproblematic." Fifth Circuit Opinion, p. 12a. [Emphasis added.]

[23] "This court has lacked either occasion or disposition to attempt to formulate such a definition for purposes of § 548(c). Moreover, the atypical posture of the fraudulent conveyance claim here, i.e., *the debtors' payments to an unaffiliated third party in an arms length transaction,* counsels caution in attempting to propound a broad rule concerning good faith for § 548(c). It is enough for present purposes to rely on the bankruptcy court's conscientious findings and conclusions." Fifth Circuit Opinion, p. 12a; 5 *Collier on Bankruptcy*, p. 548.07[2] [a] (15th Ed. 2002).

> case. Generally speaking, however, good faith requires an arms-length transaction in which the transferee herself acts honestly and without malice or fraudulent design."

In this case, there is no question that JSM was not part of nor even aware of Recile's or the debtors' improper activities.

B. NO CONFLICT WITH OTHER CIRCUITS CONCERNING VALUE

Hays argues that an unexercised option to purchase real property does not convey any value to the optionee and that the optionor therefore does not give "value" under § 548 of the bankruptcy code. The Fifth Circuit discussed the value of options and the option contracts in the course of its decision and rejected this position. Hays's heavy reliance on the Third Circuit decision in *In re: R.M.L., Inc.*, in an erroneous attempt to argue that a circuit conflict exists, is misplaced.[24]

In *R.M.L.*, the Third Circuit considered the value of a loan commitment which was never funded and contained conditions that the debtor could never have met because the commitment letter was "so conditional" and "highly conditional" because it was expressly contingent upon actions of third parties.[25] The options here were not conditional and were not dependent upon the actions of third parties; all the options did were to give the potential purchasers exclusive rights to buy the property if they

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[24] *In re: R.M.L., Inc.*, 92 F.3d 139 (3rd Cir. 1996)

[25] 92 F.3d at 142.

came to the closing with the necessary funds. The Third Circuit in *R.M.L.* found that the commitment itself had value and that the bank issuing the commitment had given value even though the loan was never funded and the creditors of the debtor did not receive any direct economic benefit from any loan proceeds.[26] There is nothing in the Fifth Circuit's opinion, below, that is inconsistent with *R.M.L.*

The Fifth Circuit's decision is also in line with the Sixth Circuit's decision of *In re: Chomakos*,[27] In *In re: Chomakos*, the Sixth Circuit held that the possibility of winning at a gambling establishment constituted reasonably equivalent value as to the wagers made and lost by the debtor,[28] Certainly, in the instant case, the debtors received

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[26] "Mellon established a valid contractual basis for retention of the $125,000. The August 9, 1991 proposal letter provided for a good faith deposit in the amount and Mellon established to my satisfaction that such agreement was of an ordinary commercial nature and that Mellon actually and reasonably incurred out of pocket expenses through the cessation as take down examination in excess of the $125,000 deposit such as warranted the retention of the deposit under the agreement. The contractual nature of this relationship is entitled to some degree of respect in the balance. Additionally, . . . the evidence indicated that the parties were at arms length at the time that the proposal was issued and accepted. Finally, a three month period passed between the transfer of the initial $125,000 and the termination of the proposed transaction; **there was adequate time for some degree of the types of indirect benefits alleged by Mellon to accrue with respect to this initial transfer.**" id. pp. 145-146. [Emphasis added.]

[27] *In re: Chomakos*, Docket No. 94-1712, 69 F.3d 769 (6th Cir. 11/13/95).

[28] "The point in time as to which we must determine whether Mr. and Mrs. Chomakos received property of reasonably equivalent value in exchange for the money they wagered at the casino is the point at which their bets were placed. See *In re: Morris Communication of North*

(Continued on following page)

far more benefit from an option on real property than the debtors received in the *Chomakos* case, for here, the debtors were given the exclusive right to buy the property, preventing other potential purchasers from buying it, and preventing the seller from marketing it to others.

The decision of the Fifth Circuit concerning valuation is completely in line with the cases cited by Hays on page 20 of the Petition for Writ of Certiorari.

The cases cited by Hays have held that the determination of value is made on a case-by-case basis and is a factual issue. In *In re: West Dor, Inc.*, 996 F.2d 237 (10th Cir. 1993), cited by Hays, the debtor corporation had pledged its assets in order to secure the debt of its parent corporation. The transferee bank was unable to show that any value was received by the debtor subsidiary in consideration of the transfers. The Tenth Circuit found no error in the trial court's factual determination that the transferee bank failed to prove that it had given any value.

In *Covey v. Commercial National Bank of Peoria*, 960 F.2d 657 (7th Cir. 1992), the court considered whether the debtor, a guarantor on the debt of its parent corporation, received value for satisfying a portion of the debt owed to the bank. Again, the Seventh Circuit held that this was a factual issue and that the trial court's findings would not

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Carolina, Inc., No. 88-3060, 88-3062, 914 F.2d 458, 466 (4th Cir. 9/13/90), quoting *Collier on Bankruptcy*, Sec. 548.09 at p. 116 (15th Ed. 1984), as follows: the critical time is when the transfer was made. Neither subsequent depreciation in or appreciation of value of consideration affects the question of when reasonably equivalent value is given." Id. pp. 770-771.

be upset absent a showing of clear error. The court went through a detailed analysis of the probability of the amount that the debtor guarantor would have to pay under the contingent liability.

In the *Covey* case, the debtor had paid the bank $1.47 million. The trial court underwent a detailed analysis of the value received by the debtor and determined that the debtor received approximately $1.2 million in value and only ordered the bank to return the difference. Again, this was a factual determination made by the trial court.

Hays also cites the case of *In re: Grand Chevrolet, Inc.*, 25 F.3d 728 (9th Cir. 1994). First, that case involved preferential transfers under 11 U.S.C. § 547 and did not involve the determination of value under § 548. However, the court held that this was a factual issue and that the transferee was required to prove the value of the transfer.

In *In re: Jet Florida Systems, Inc.*, 861 F.2d 1555 (11th Cir. 1988), the court was also required to make a factual determination concerning the value of the transfer received by the debtor. In that case, the value was determined based upon the market value of the goods and services and the new credit received by the debtor.

Similarly, the value received by the debtors in the instant case was determined based upon the value of the options at the time the transfers were made.

C. VALUE OF OPTION ON REAL PROPERTY; REAL RIGHT

Louisiana law has always recognized the value of an option on real property. The option confers a right upon the prospective vendee to perfect the sale, which right may

be specifically enforced. This right is an incident of ownership, a real right affecting the immovable property which is the subject of the contract. The seller may not sell the property to a third party in derogation of the right of the buyer under a prior option. The option gives the buyer the exclusive right to demand specific performance of the sale. Professor Yiannopoulos, *Real Rights in Comparative Law*, part 1. 23 La.L.R. 166, 138 (1963). *George v. Manhattan Land and Fruit Co.*, No. 6079, 51 F.2d 28, 30 (5th Cir. 6/29/31).

On an analogous issue, this Honorable Court held in *Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 1119 S.Ct. 1141, 143 L.Ed.2d 607 (1999), that in the context of the absolute priority rule under the cram down provisions of Chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1129), that the plan which gave the old equity owners of a reorganized debtor corporation the exclusive right to purchase the new stock interest or to make new capital contributions in order to retain the old stock interest was violative of the absolute priority rule. This Court reasoned that the exclusive right given to the old equity holder constituted property with value which violated the absolute priority rule. The Court stated,

> "But before the debtor's plan was accepted, no one else can propose an alternative one, and after its acceptance, no one else could obtain equity in the reorganized entity. At the moment of the plan's approval, **the debtor's partners necessarily enjoyed an exclusive opportunity that was in no economic sense distinguishable from the advantage of the exclusively entitled offerer or option holder. This opportunity should first of all be treated as an**

> **item of property in its own right.** *In re: Coltex Lube Central Three Partners, L.P.*, 138 F.3d at 43 (exclusive right to purchase post petition equity is in itself property); *In re: Bryson Properties, XVIII*, 961 F.2d at 504, *Com & Nate Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1360 (Ct. App. 7th Cir. 1990); D. Baird, *The Elements of Bankruptcy*, 261 (Rev. Ed. 1993). The right to get an equity interest for its fair market value is property as the word is ordinarily used. Options to acquire an interest in a firm, even at its market value, trade for a positive price . . .
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> Given that the opportunity is property of some value, the question arises why old equity alone should obtain it, not to mention at no cost whatever." 526 U.S. at 455-456. [Emphasis added.]

In the *LaSalle* case, this Court clearly recognized that an exclusive right or option to purchase something of value, in that case stock ownership in a reorganized company, was itself valuable property. Similarly, the exclusive right to purchase real property is also a property right which has value.

All of the circuits agree that the determination of value under § 548 is a factual question which must be determined on a case-by-case basis and that the clearly erroneous standard is applied to the trial court's findings.

D. CRITERIA THAT HAYS WOULD HAVE THIS COURT ESTABLISH, WOULD CAUSE HAVOC IN COMMERCIAL TRANSACTIONS

Hays asks this Court to establish a totally amorphous criteria that could not be met by any transferee. Hays proposes an economic impact test. For example, if a car

dealer sells the debtor a new vehicle for $20,000, its market value, this would obviously be a fair transaction in which equal values are exchanged.

However, under Hays's theory, the inquiry would not end at this point. Rather, Hays would require the transferee to conduct an extensive economic analysis to determine the value of the use of the vehicle, not only to the debtor, but also to the debtor's creditors. The car dealership would have to prove that the vehicle was used to generate revenues which were used to pay the creditors. The transferee would have to quantify the amount of funds so generated in order to determine the "extent of the value given" by the dealership. Obviously, this would be an impossible task. This Court can well imagine the chaos and havoc that would be created in the commercial world if this Court were to render such a decision.

E. FIFTH CIRCUIT DECISION FOLLOWS THIS COURT'S DECISION ON VALUE

In *Associates Commercial Corporation v. Rash*, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997), this Court held that the proper standard in determining value is the replacement value of the property, i.e., *the costs that the debtor would incur to obtain a like asset for the same proposed use*. The analysis performed by JSM's expert, and adopted by the Fifth Circuit and the trial court, used this exact methodology. Dr. Aguilar determined what it would cost to maintain an option on similar property with similar values and found that the option payments were therefore reasonable.

Similarly, the transferee is only required to show the market value of the property or right transferred to the

debtor under § 548. It would be virtually impossible for any transferee to show that the specific transfer resulted in an economic gain to any of the debtor's creditors. How could this be done in a consumer transaction in which a vehicle or other item is merely used for enjoyment purposes or non-business related purposes? Is the car dealership then in bad faith because it knew or suspected that the vehicle was a recreational vehicle and not being used for business purposes? Would the car dealer then have to hire an expert economist to prove the value of the vehicle to the debtor and the debtor's creditors? What if the debtor never uses the car? This Court's decision in *Rash* requires no such analysis.

F. HAYS ASSERTS A FALSE PREMISE CONTRADICTED BY THE RECORD

Hays erroneously maintains that the options had no value because they were impossible for the debtors to exercise. There is no factual basis in the record for this assertion. No evidence was introduced during the trial to support this position and no findings were ever made by the trial court that it would have been impossible for the debtors to exercise the options.

Indeed, as the evidence that was introduced indicates, the district court, which presided over the SEC lawsuit, was ever hopeful that the debtors would obtain the necessary financing in order to fund the options and repay the investors.[29] The SEC lawsuit was commenced in April of 1991 and continued until the permanent injunction was

[29] Bankruptcy Court Opinion, pp. 127a-128a.

issued appointing Hays as the receiver on July 29, 1992, approximately fifteen months later. During this period of time, the SEC, the debtors, Sam Recile and Hays, himself, were all hopeful that Recile would obtain the necessary financing.[30] Additionally, Hays was appointed as the special master in order to investigate the financial affairs of the debtor corporations. During this period of time, from April 1991 through July 29, 1992, Hays, as special master, filed a number of interim reports with the federal district court in the SEC lawsuit. *In none of these reports did Hays ever indicate that it would be impossible to obtain the necessary financing or that the debtors would not be able to exercise the options on the property.* The trial court found, as a matter of fact, that:

> "The debtors were being investigated at the time by the SEC, the special master [Hays], and the special master's attorney. None of them ever advised JSM of any improper conduct or any wrongful actions on the part of the debtor. The reports submitted to the federal district court did not indicate that the project was not feasible or viable or that it would be impossible for the debtors to obtain permanent financing for the project. Hays testified that he never advised the federal district court that the purported lending institutions were not legitimate or capable of funding the required loans to the debtors".[31]

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[30] Bankruptcy Court Opinion, p. 68a, para. 7; p. 76a, subpart H, the "SEC lawsuit", para. 37-45; p. 116a.

[31] Bankruptcy Court Opinion, p. 128a.

V. HAYS'S DUE PROCESS RIGHTS WERE NOT VIOLATED

There is absolutely no validity in Hays's claim that his due process rights were violated, as the record clearly shows.

Hays initially filed the adversary complaint against JSM alleging, as one of the grounds for recovery, a claim under 11 U.S.C. § 544(b)(1). Section 544(b)(1) allows a bankruptcy trustee to pursue a claim under applicable state law. In this case, Hays pursued the claim under the Louisiana Revocatory Act (the "Act"), which allows a creditor to avoid a transfer made by its debtor (obligor) that causes or increases the obligor's insolvency. La.C.C. Art. 2040, which is part of the Act, provides that the transfer cannot be avoided if it is made in the ordinary course of the obligor's business.

When Hays initially filed his claim under the Act, he did so subject to all of the defenses contained in the Act. Hays advises this Court that JSM never argued the Art. 2040 defense issue. This is not correct. During the course of the trial, both Hays and JSM introduced evidence concerning the nature of the venture.[32] The evidence clearly showed that the transfers were not only made in the ordinary course of the debtors' business, but were absolutely

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[32] Testimony of Hays on direct and cross examination contained in Vol. 22 of trial transcript. Hays discussed the entire project including the necessity of the options on JSM's property. Indeed, Hays testified that when he was first appointed as the special master, he was concerned that the option's on JSM's land had elapsed. Trans. Vol. 22, pp. 31-34.

essential to the success of the project.[33] Obtaining these options was clearly within the normal scope of the debtors' business.

Hays complains about a footnote in the bankruptcy court's opinion in which the bankruptcy court cites a reported case in which Recile was recognized as a real estate "wizard."[34] This is not a case of judicial notice; courts are empowered to rely upon the decisions of other courts, for that is the basis of the common law. There is nothing wrong with citing an earlier court opinion that dealt with Recile and his real estate ventures; the entire case involved a real estate venture, and the information was pertinent and useful in showing Recile's long-time involvement in the real estate field. The bankruptcy court did not solely rely on this opinion in rendering its decision.

There was more than sufficient evidence introduced to support the trial court's finding that the transfers were made in the ordinary course of business of the real estate investment. The project, by definition, required the obtaining of property for the mall site. Ironically, the bankruptcy court relied primarily upon the testimony of Hays, himself, to decide this issue.

The provisions of La.C.C. Art. 2040 are inherent in the claim pursued by Hays under the Act and were raised at

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[33] Bankruptcy Court Opinion, p. 134a, in which the bankruptcy court stated, "JSM was not involved in Recile's fraudulent activities and received fair consideration for giving the debtors options to ***purchase land necessary to complete the mall project which was the whole point of the debtor's business. The transfers were in the ordinary course of business and may not be annulled.***"

[34] Bankruptcy Court Opinion, p. 130a, fn. 9.

all levels during the trial and appeal. Hays's due process rights were not violated. The bankruptcy court thoroughly discussed this issue.[35] This is a non-issue in this case.

VI. CONCLUSION

This case does not meet the requirements for the granting of a writ of certiorari. There is no conflict in the circuits. The interpretation that Hays gives Bankruptcy Code § 548 is wrong, and would lead to disastrous consequences. The Fifth Circuit, relying upon the factual findings of the bankruptcy court and applying the clearly erroneous standard, properly found that the factual findings were appropriate. The Fifth Circuit did not violate Hays's due process rights; all the issues were properly before the court.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[35] Bankruptcy Court Opinion, pp. 133a-134a. The Bankruptcy Court indicated that, ab initio that, "finally, JSM asserts that the exception contained in La.C.C. Art. 2040 is applicable to the receiver's claims."

APPENDIX A

Text of Bankruptcy Code and Louisiana Civil Code Involved in This Case

Title 11 United States Code, Section 544 (West 2003)
Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowed under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any such person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

Title 11 United States Code, Section 548 (2003)
Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which. –

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution was made; or

(B) the contribution made by the debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of the partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under Section 544, 545 or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section –

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title,

in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution –

(A) is made by a natural person; and

(B) consists of –

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) Cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means –

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

Louisiana Civil Code of 1870, Book III, Title IV, Chapter 12, Sec. 1, Arts. 2036-2043 (West Group 2001) – Louisiana Revocatory Act.

La.C.C. Art. 2036. Act of the Obligor that Causes or Increases His Insolvency

An obligee has a right to annul an act of the obligor. or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency.

La.C.C.Art. 2040. Contract made in course of business.

An obligee may not annul a contract made by the obligor in the regular course of his business.